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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CONTEMPORARY MEDIA, INC, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Federal Communications Commission order revoking seven radio broadcast station licenses and permits due to sexual offenses that had no relationship to the radio stations is a non-remedial, punitive sanction that is subject to scrutiny under the Eighth Amendment's prohibition of excessive fines.

PARTIES TO THE PROCEEDING

Petitioners are Contemporary Media, Inc. ("CMI"), Contemporary Broadcasting, Inc. ("CBI") and Lake Broadcasting, Inc. ("LBI").

Respondents are the Federal Communications Commission and the United States of America.

CORPORATE DISCLOSURE STATEMENT

CMI, CBI and LBI are Missouri corporations organized for the purpose of owning and operating radio broadcast stations. No publicly-held company holds any ownership interest in any of the three corporations, nor has any of the three corporations issued any shares of equity or debt securities to the public. CBI is a wholly-owned subsidiary of CMI, and CMI and LBI are both wholly owned by an individual, Mr. Michael S. Rice.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") is reported at *Contemporary Media, Inc. v. FCC*, 214 F.3d 187 (D.C. Cir. 2000) ("*D.C. Circuit Opinion*") (App. A). The D.C. Circuit's opinion affirmed a decision of the Federal Communications Commission ("FCC") and an FCC order on reconsideration which are reported at *Contemporary Media, Inc.*, 13 F.C.C. Rcd. 14437 (1998) ("*FCC Decision*") (App. B), *recon. denied*, 14 F.C.C. Rcd. 8790 (1999) ("*FCC Reconsideration Order*") (App. C).

STATEMENT OF JURISDICTION

The judgment of the D.C. Circuit was entered on June 16, 2000. The D.C. Circuit entered two orders denying a timely petition for rehearing or rehearing *en banc* on September 14, 2000 (App. D & App. E).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

A. Overview

In an FCC license revocation proceeding conducted pursuant to 47 U.S.C. §312(c), the FCC revoked five commercial radio broadcast station licenses and two radio station construction permits due to sexual offenses committed by the owner of the stations, Mr. Michael S. Rice.[1] The FCC ruled that the sexual offenses proved that Mr. Rice lacked the "character qualifications" necessary to own a radio station, despite the fact that the offenses had no relationship to Mr. Rice's radio stations or to his past or prospective performance or professional ability as a radio broadcaster and station owner. Pursuant to its jurisdiction to review FCC orders under 47 U.S.C. §402(b), the D.C. Circuit affirmed the FCC's decision.

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[1] The five licenses and two permits are held by the Petitioner corporations, which in turn are wholly-owned by Mr. Rice.

The FCC's decision to revoke Mr. Rice's authorizations also relied on a second ground, alleged false statements by the licensee corporations to the FCC regarding Mr. Rice's role at the stations after the misconduct charges had been filed, but the FCC based its ultimate decision to revoke Mr. Rice's authorizations on the *collective* weight of the evidence on both grounds. *FCC Decision*, 13 F.C.C. Rcd. at 14459-60 (¶¶41 & 43) (App. B at 59a-62a) (relying on the "totality of the evidence" and the "cumulative" evidence on both grounds to justify revocation). The Eighth Amendment issue presented in this petition therefore is not insulated from review by any separate and independent basis for the FCC's revocation order.

At each stage in the proceedings below, Petitioners argued that the revocation of Mr. Rice's radio licenses and permits, based on his unrelated sexual misconduct, would constitute a punitive sanction and therefore would be subject to scrutiny under the Eighth Amendment's prohibition of excessive fines. The FCC rejected that argument, ruling that the Eighth Amendment has no application to an FCC decision to revoke a broadcast license or permit.[2] The D.C. Circuit affirmed that FCC ruling.[3]

The D.C. Circuit's judgment conflicts directly with the Supreme Court's recent decisions interpreting the Eighth Amendment. Because Mr. Rice's sex offenses were unrelated to his radio stations, the FCC's decision to revoke Mr. Rice's radio authorizations served no remedial purpose, but was rather a penalty imposed by the FCC because it viewed Mr. Rice's sexual misconduct as "egregious."

The effect of the FCC's revocation sanction is to deprive a life-long broadcaster of a valuable radio broadcast business that it has take him his entire forty-year professional lifetime to create, a business by which he earns his livelihood and practices his profession. Under *United States v. Bajakajian,* 524 U.S. 321 (1998), and *Austin v. United States,* 509 U.S. 602 (1993), such a non-remedial, punitive sanction is subject to scrutiny under the Eighth Amendment's prohibition of excessive fines. The D.C. Circuit's contrary holding conflicts with *Bajakajian* and *Austin* and should be reviewed and reversed by this Court.

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2 *FCC Decision,* 13 F.C.C. Rcd. at 14459-60 (¶ 42) (App. B at 60a-61a); *FCC Reconsideration Order,* 14 F.C.C. Rcd. at 8795 (¶13) (App. C at 73a).

3 *D.C. Circuit Opinion,* 214 F.3d at 198-99 (App. A at 18a-20a).

B. Factual Background

Petitioners first raised their Eighth Amendment claim before the FCC in a prehearing brief urging that Mr. Rice's stations should not be designated for revocation.[4] In its subsequent order designating Mr. Rice's stations for a revocation hearing, the FCC simply ignored Petitioners' Eighth Amendment claim, and thus effectively denied it without comment or explanation.[5] Because the FCC did not conduct any hearing to determine whether revocation of Mr. Rice's radio authorizations is an excessive penalty within the meaning of the Eighth Amendment, no factual record was developed before the FCC on the Eighth Amendment issue.

The following facts, drawn from the FCC hearing record compiled on other issues and from the pre-hearing brief in which Petitioners first presented their Eighth Amendment claim to the FCC, are provided to demonstrate that the question of whether the Eighth Amendment's prohibition of excessive fines has application to the FCC's license revocation action is appropriate for consideration in this case, because a substantial question exists regarding whether the FCC's license

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[4] Brief in Opposition to Commencement of Revocation or Evidentiary Hearing at 20-22 & Exhibits B, C & E, submitted by Petitioners to the FCC in FCC File Nos. BL-920924AB, *et al.*, on December 20, 1994 (hereafter Petitioner's "Pre-hearing Brief").

[5] *Contemporary Media, Inc.*, 10 F.C.C. Rcd. 13685 (1995) (FCC Order to Show Cause and Notice of Apparent Liability). At the end of the revocation hearing, Petitioners again raised their Eighth Amendment claim before the FCC's Administrative Law Judge in Petitioners' post-hearing Proposed Findings of Fact and Conclusions of Law (at 67-69) submitted to the ALJ on September 9, 1996. The FCC's ALJ also ignored Petitioners' Eighth Amendment claim in his decision that Mr. Rice's radio authorizations should all be revoked. *Contemporary Media, Inc.*, 12 F.C.C. Rcd. 14254 (ALJ 1997) (ALJ Initial Decision).

revocation penalty was grossly disproportionate to Mr. Rice's state law offenses, and was thus excessive and unconstitutional under the Eighth Amendment.

1. Michael Rice's Record as a Broadcaster

Michael Rice is 59 years old. He began his career in radio broadcasting in 1961, at the age of twenty, after studying broadcasting in school. He worked as disk jockey, station engineer and in other capacities at several broadcast stations over the course of seven years before acquiring his first ownership interest in a radio station in 1968. For the next three decades, Mr. Rice worked to build his radio business. He acquired additional stations, some by purchase and some by constructing them himself "from the ground up" after obtaining FCC permits to build new stations. Mr. Rice also became (largely by self-education) an accomplished broadcast engineer, and he was formally certified as a Professional Broadcast Engineer by the Society of Broadcast Engineers in 1990.[6]

During his forty-year career as a radio broadcaster, Michael Rice never committed any form of misconduct relating in any way to his ownership or operation of a radio station.[7] Mr. Rice and his stations have been honored and

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6 Petitioners' Pre-hearing Brief, *supra* note 4, at Exhibit B.

7 The FCC found in its decision that two of Mr. Rice's stations were once assessed "minor forfeitures" (the actual total fine amount was $900) for paperwork errors involving FCC logging and quarterly "issues/programs lists" requirements. *FCC Decision,* 13 F.C.C. Rcd. at 14440 (¶6) (App. B at 26a). That is the only broadcast-related offense that can be found in Michael Rice's forty-year professional record of faithful adherence to every broadcast law and FCC regulation that exists. Indeed, the FCC gave Mr. Rice "credit" for his long and unblemished career as a radio broadcaster, even as it determined that he nevertheless lacked the "character" to own his radio stations due to his unrelated

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commended many times for their service to the public.[8] Mr. Rice's record as a broadcaster has thus been unblemished, and indeed distinguished, throughout his entire career in the radio industry.

As a result of a lifetime of work, Michael Rice currently owns five licensed and fully operational full power commercial radio stations – an FM and two AM stations in Terre Haute, Indiana,[9] an FM station in Columbia, Missouri[10] and an FM station in Eldon, Missouri.[11] Mr. Rice also holds FCC construction permits for two additional FM stations to be located in Huntsville and Cuba, Missouri.[12]

Although the monetary value of Mr. Rice's radio stations was not relevant to the issues in the FCC's hearing and therefore is not in the FCC's hearing record, Petitioners expect to be able to prove, in an appropriate FCC hearing on the

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sexual misconduct. *Id.* at 14440 & 14444-46 (¶¶7 & 15-16) (App. B at 26a-27a & 34a-37a).

8 Petitioners proffered to the FCC extensive evidence regarding the good broadcast record of Michael Rice and his stations. *E.g.*, Petitioners' FCC Hearing Exhibits 2 (at Appendix A), 3 (at Appendix A) & 4 (at Appendix A). The FCC refused to consider any of that material, finding that the alleged "moral turpitude" of Mr. Rice made evidence about his good broadcast record irrelevant. *FCC Decision*, 13 F.C.C. Rcd. at 14444-46 (¶15) (App. B at 34a-36a).

9 WBOW(AM), WBFX(AM) (now WBUZ(AM)) and WZZQ(FM).

10 KFMZ(FM).

11 KBMX(FM).

12 As yet unbuilt stations KAAM-FM (now KROW(FM)) (Huntsville) and KFXE-FM (Cuba).

Eighth Amendment issue, that Mr. Rice's seven radio licenses and permits are worth between seven and twelve million dollars. That entire value – as well as a lifetime of work, an ongoing business and an exemplary, forty-year career in radio broadcasting – is the sum of what the FCC's revocation order declared forfeit due to Mr. Rice's state sexual offenses.

2. Mr. Rice's State Conviction, Medical Condition, Treatment and Rehabilitation

In 1991, Mr. Rice was charged by the State of Missouri with engaging in sex acts with several teenage males. The offenses were nonviolent in nature but constituted felonies under Missouri law because the teenage participants were under the age of seventeen. The offenses did not occur at Mr. Rice's radio stations and were not in any other respect related to Mr. Rice's stations or to his performance as a radio broadcaster and station owner.

Immediately following the state charges, Mr. Rice checked himself into Barnes Hospital in St. Louis, Missouri, where he spent six months as an in-patient undergoing intensive psychiatric evaluation and treatment. Mr. Rice was diagnosed as suffering from several serious genetic and biochemical disorders which, in the opinion of his treating psychiatrist, Dr. Wayne A. Stillings, directly led to his sexual misconduct.[13] Mr. Rice's disorders include Bipolar Affective

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[13] The primary record information regarding Mr. Rice's medical condition is contained in the July 29, 1994 report of Wayne A. Stillings, M.D., who has been Mr. Rice's primary treating psychiatrist since his hospitalization in 1991. Dr. Stillings is a highly qualified, Board-certified psychiatrist who teaches Clinical Psychiatry at the Washington University School of Medicine in St. Louis, Missouri. His 1994 report regarding Mr. Rice was based on extensive psychiatric testing and over 200 therapy sessions with Mr. Rice. Dr. Stillings' report was submitted to the Missouri court in connection with the criminal proceeding against

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Disorder, Mixed (commonly referred to as "manic depression"), Dysthymia (chronic major depression), Dissociative Disorder NOS (commonly called "split personality" or "multiple personality" disorder) and Alcohol Abuse.

Beginning with his hospitalization in 1991, and, Petitioners would demonstrate in an appropriate FCC hearing, continuing to the present day, Mr. Rice has followed his psychiatrist's recommended course of treatment, which includes regular psychiatric therapy sessions and daily maintenance on psychotropic medications.[14] That regimen has successfully maintained Mr. Rice's psychiatric illnesses in remission for the past ten years.

In 1994, based on a brief record of stipulated testimony and without conducting an actual trial, Mr. Rice was convicted by a Missouri court of having performed oral (or in one case manual) sex acts between 1984 and 1990 on five teenage males.[15] Although the maximum penalty provided by

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Mr. Rice and was also supplied to the FCC in Petitioners' Pre-hearing Brief, *supra* note 4, at Exhibit E (App. F), which first raised Petitioners' Eighth Amendment claim before the FCC.

[14] At the time of Dr. Stillings' 1994 report, Mr. Rice's medications consisted of Lithium (900 mg per day) and Prozac (40 mg per day). Petitioners' Pre-hearing Brief, *supra* note 4, at Exhibit E (App. F at 78a). At present, Mr. Rice's medications consist of Lithium (300 mg twice daily), Prozac (20 mg four times daily) and Wellbutrin SR (150 mg twice daily).

[15] FCC Mass Media Bureau Hearing Exhibit 1 at 14-19 (stipulated testimony) & 21-22 (sentencing order). The brief memorandum of stipulated testimony which constituted the entire record on which Mr. Rice was convicted by the Missouri court stated only that Mr. Rice performed oral (or in one case manual) sex acts on the teenage boys. *Id.*
(Continued...)

Missouri law for the crimes of which Mr. Rice was convicted was a term of incarceration of 112 years and a fine of $40,000,[16] the Missouri court sentenced Mr. Rice to an effective term of only eight years of incarceration[17] and imposed no fine.[18]

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at 14-19. Neither the stipulated testimony, nor the sentencing order, nor the State of Missouri's criminal charges lodged against Mr. Rice (FCC Mass Media Bureau Hearing Exhibit 1 at 7-12 (Second Amended Information)) nor anything else in the record before the FCC in any way indicates that any form of "force" was involved in any of the sex acts in question. The D.C. Circuit's opinion thus departed entirely from the agency record when it stated that Mr. Rice had committed "forcible sodomy." *D.C. Circuit Opinion,* 214 F.3d at 190 (App. A at 3a).

[16] Four of the counts carried a maximum term of incarceration of 15 years; six carried a maximum term of seven years; and two carried a maximum term of five years. MO. REV. STAT. §558.011.1(2)-(4); see FCC Mass Media Bureau Hearing Exhibit 1 at 7-12 (Second Amended Information) & 21-22 (sentencing order). Missouri law also provides for a fine of up to $5,000 on eight of the counts (the class C and D counts). MO. REV. STAT. §560.011.1(1).

[17] FCC Mass Media Bureau Hearing Exhibit 1 at 21-22 (sentencing order). Because the court ordered that its separate sentences on each of the twelve counts were all to run concurrently, the effective sentence of incarceration was the longest term imposed on any of the counts – eight years. The D.C. Circuit's opinion and the decision of the FCC are thus misleading when they state that Mr. Rice was sentenced to serve "a total of eighty-four years in prison." *D.C. Circuit Decision,* 214 F.3d at 191 (App. A at 3a-4a); *FCC Decision,* 13 F.C.C. Rcd. at 14439 (¶5) (App. B at 26a).

[18] Mr. Rice was ordered by the Missouri court to pay a small amount ($46) to a victims' compensation fund. FCC Mass Media Bureau Hearing Exhibit 1 at 22 (sentencing order).

Mr. Rice was incarcerated in Missouri in the fall of 1994, and he served five years and three months of his eight-year sentence. He was released from prison on parole in December of 1999. While in prison, Mr. Rice continued to undergo psychiatric treatment for his illnesses and also successfully completed a state-run program designed to rehabilitate sexual offenders (the Missouri Sexual Offender Program, or "MOSOP").

At no time since his hospitalization in April of 1991 has Mr. Rice been accused of engaging in any type of sexual or other misconduct. In the opinion of Mr. Rice's treating psychiatrist, Dr. Stillings, Mr. Rice has been successfully treated for his illnesses, has been in total remission for the past ten years, and will remain so indefinitely under the course of treatment which he has followed since 1991. Also in the opinion of Dr. Stillings, as Petitioners would demonstrate in an appropriate hearing before the FCC on the Eighth Amendment issue, it is critical to Mr. Rice's continued mental and physical health that he be permitted to continue the radio business which he has spent his entire adult life building – and which is and has been, during his entire adult life, the primary means by which Mr. Rice makes a valuable and positive contribution to our society.

C. Proceedings Below

In 1995, while Mr. Rice was in prison, the FCC commenced its administrative proceeding to determine whether to revoke Mr. Rice's radio authorizations, due to his conviction of state sex offenses. Both before and after the FCC's evidentiary hearing proceeding, Petitioners raised their Eighth Amendment claim, only to have it ignored by the FCC itself and later by the FCC's ALJ.[19] In 1997, while Mr. Rice

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19 See notes 4-5, and accompanying text, *supra*.

remained in prison, the FCC's ALJ issued an initial decision which, without addressing the Eighth Amendment issue, ruled that all of Mr. Rice's radio licenses and permits should be revoked due to his unrelated sexual misconduct.[20]

In their application for review of the ALJ's decision, Petitioners again raised their Eighth Amendment claim before the FCC. The FCC addressed the Eighth Amendment issue for the first time in its 1998 decision affirming the revocation of all of Mr. Rice's radio authorizations. In that decision, the FCC claimed that the Eighth Amendment has no application to its decision to revoke Mr. Rice's radio authorizations, because its purpose was "not to impose punishment" on Mr. Rice.[21] The FCC did not explain, however, what *remedial* purpose there could be in revoking Mr. Rice's radio authorizations for sexual misconduct which had nothing to do with Mr. Rice's radio stations or with his performance or ability as a broadcaster. The FCC also claimed that broadcast licensees "do not own their authorizations," a claim which is false, and that license revocation "does not involve forfeiture or seizure of the physical assets or facilities of the station," a fact which is true but irrelevant to the Eighth Amendment issue.[22]

Petitioners again raised their Eighth Amendment claim in seeking reconsideration by the FCC, drawing the FCC's attention to the Supreme Court's recent decision in *United States v. Bajakajian,* 524 U.S. 321 (1998), which had been decided only three days prior to the FCC's June 25, 1998

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20 *Contemporary Media, Inc.,* 12 F.C.C. Rcd. 14254 (ALJ 1997) (Initial Decision).

21 *FCC Decision*, 13 F.C.C. Rcd. at 14459-60 (¶42) (App. B at 60a-61a).

22 *Id.*

decision to revoke all of Mr. Rice's radio authorizations. The FCC again rejected the Eighth Amendment claim, stating that *Bajakajian* "appears to have little bearing on the Commission's revocation authority."[23] The FCC stated that revocation "is intended to ensure that stations will be operated in the public interest," but it did not explain how a license revocation for unrelated sex offenses "ensures" or otherwise furthers Mr. Rice's radio stations' "operation in the public interest."[24] The FCC also repeated its claim that revocation "does not involve a seizure of the Licensees' property," which is entirely untrue.[25]

On appeal to the D.C. Circuit, Petitioners again raised their Eighth Amendment claim. The D.C. Circuit rejected the claim, stating that FCC revocation of a broadcast license is not a punitive sanction, but rather one imposed when "the licensee is no longer qualified to hold" the license or when it "can no longer be trusted to deal with [the FCC] honestly."[26] The court did not attempt to explain, however, why Mr. Rice's unrelated sex offenses made him "unqualified" to hold a broadcast license or how such unrelated offenses could have probative bearing on Mr. Rice's propensity to be honest in his dealings with the FCC.

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23 *FCC Order on Reconsideration,* 14 F.C.C. Rcd. at 8795 (¶13) (App. C at 73a).

24 *Id.*

25 *Id.*

26 *D.C. Circuit Opinion,* 214 F.3d at 198-99 (App. A at 18a-20a).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND WITH PRIOR PRECEDENT OF THE D.C. CIRCUIT

The D.C. Circuit's holding that the Eighth Amendment has no application to the FCC's revocation of Mr. Rice's radio licenses and permits cannot be reconciled with Supreme Court precedent.

The purpose of the Eighth Amendment's prohibition of excessive fines, like that of Section 10 of the English Bill of Rights of 1689 on which it was directly modeled, is "to prevent the government from abusing its power to punish." *Austin v. United States*, 509 U.S. 602, 607 (1993) ("*Austin*"), citing *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266-67 (1989); *see also United States v. Bajakajian*, 524 U.S. 321, 335-36 (1998) ("*Bajakajian*"). As the Supreme Court explained in *Bajakajian,* the English Bill of Rights prohibition was intended to prohibit abusive fines imposed during the reigns of the Stuarts in violation of Magna Charta's requirement that fines "be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood." *Bajakajian*, 524 U.S. at 335-36.[27]

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[27] As quoted in *Bajakajian*, Magna Charta provided that

A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement; (2) and a Merchant likewise, saving to him his merchandise; (3) and any other's villain than ours shall be likewise amerced, saving his wainage.

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Given these historical origins, the Eighth Amendment's prohibition of excessive fines has particular force and relevance – as the Supreme Court expressly recognized in *Bajakajian* – where the effect of a government-ordered forfeiture is to deprive an individual of the means by which he practices his profession and earns his livelihood. 524 U.S. at 335-36; *see also id.* at 340 n.15 (noting the absence of any claim that "full forfeiture would deprive [Mr. Bajakajian] of his livelihood"). Such a deprivation of means of livelihood is precisely the circumstance involved in the FCC's instant revocation of all of Michael Rice's radio broadcast licenses and permits.

More generally, the Eighth Amendment "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *Bajakajian*, 524 U.S. at 328, quoting *Austin*, 509 U.S. at 609-10. Notwithstanding the FCC's apparent claim to the contrary,[28] the holder of a broadcast license or construction permit unquestionably holds a valuable property interest in the license or permit.[29] An FCC

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524 U.S. at 335-36. An "amercement" is a fine. *Id.* Black's Law Dictionary defines "contenement" as "that which is necessary for the support and maintenance of men, agreeably to their several qualities or states of life," and "wainage" as the "team and instruments of husbandry belonging to a countryman, and especially to a villein who was required to perform agricultural services." BLACK'S LAW DICTIONARY 390 & 1751 (Rev. 4th ed. 1968).

[28] See *FCC Decision*, 13 F.C.C. Rcd. at 14459 (¶42) (App. B at 60a-61a); *FCC Reconsideration Order*, 14 F.C.C. Rcd. at 8795 (¶13) (App. C. at 73a).

[29] *E.g., Yankee Network, Inc. v. FCC*, 107 F.2d 212, 217 (D.C. Cir. 1939). One need look no further than the FCC's own enabling statute, the Communications Act of 1934, as amended, to find proof of the (Continued...)

order revoking the property interest in a license or permit and declaring it forfeit to the federal government (for eventual sale by the FCC at auction to the highest bidder) therefore extracts a "payment . . . in kind" and thus clearly does, if imposed as "punishment for some offense," constitute a "fine" under the Eighth Amendment.

The central question in determining whether the Eighth Amendment applies to the FCC license and permit revocations ordered in this case is thus whether the FCC ordered the revocations as "punishment for some offense" – as a penalty, in short – or rather solely for remedial purposes. In this regard, the Supreme Court has made it clear that to fall outside the scope of the Eighth Amendment, a sanction must be *solely* remedial in nature. If it is punitive *even in part*, the Supreme Court has held, the Eighth Amendment is fully applicable. *Bajakajian,* 524 U.S. at 329 & n.4; *Austin,* 509 U.S. at 621-22.

(...Continued)
fallacy of the FCC's apparent claim that broadcast licenses and permits are not "property" that is "owned" by the license or permit holder. Under 47 U.S.C. §309(j), the FCC is authorized to, and routinely does, award radio broadcast licenses and permits to the highest bidder in FCC-conducted auctions. In July of this year, for example, the FCC auctioned off a construction permit for a new television station at Blanco, Texas, for a high bid of $18,798,000 (July 18, 2000 FCC Public Notice DA 00-1593). FCC auction bidders do not pay millions of dollars to the federal government for licenses and permits that they do not "own" or hold any property interest in. Radio broadcast authorizations are also routinely bought and sold, pursuant to applications which the FCC itself approves, for purchase prices in the tens and even hundreds of millions of dollars. The FCC's claim that the holder of a broadcast license or permit does not "own" or possess any property interest in the license or permit is thus simply false.

The D.C. Circuit's holding cannot be reconciled with these Eighth Amendment principles. The primary basis for the D.C. Circuit's ruling that the FCC's license revocation order was not punitive in nature is the decision of the Supreme Court in *WOKO, Inc. v. FCC,* 329 U.S. 223 (1946) ("*WOKO*"). See *D.C. Circuit Opinion*, 214 F.3d at 198-99 (App. A at 18a-20a). *WOKO* is not on point, however.

In *WOKO,* the FCC imposed a *purely remedial* sanction – the disqualification of a broadcaster for intentionally submitting false statements to the FCC in its radio broadcast applications. As the Supreme Court said in *WOKO*, "denial of an application for a license because of the insufficiency or deliberate falsity of the information lawfully required to be furnished is not a penal measure." 329 U.S. at 228. In this case, by contrast, the FCC imposed a *purely punitive* revocation sanction for what it called "egregious" sexual misconduct that had no relationship to Mr. Rice's radio stations, to his dealings with the FCC or to any other broadcast regulatory function entrusted by law to FCC oversight. This critical distinction places this case on an entirely different footing than *WOKO* for Eighth Amendment purposes. The D.C. Circuit's reliance on *WOKO* is therefore misplaced.

The D.C. Circuit also stated that an FCC license revocation action is intended "not to punish a licensee for its conduct, but because that conduct indicates to the Commission that the licensee is no longer qualified" to hold a broadcast license.[30] That statement would be true of many FCC revocation actions – those which are imposed for misconduct that has some relationship to a licensee's performance as a broadcaster. No such relationship exists, however, between Mr. Rice's ownership and operation of his radio stations and his entirely unrelated state sex offenses.

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30 *D.C. Circuit Opinion,* 214 F.3d at 199 (App. A at 20a).

The D.C. Circuit's opinion and the decisions of the FCC make it plain that both the appeals court and the agency found Mr. Rice's sexual misconduct to be abhorrent, but to make abhorrence (or "egregious misconduct," the term employed by the FCC) an operative standard for measuring a broadcast licensee's "qualifications" is simply to engage in the business of meeting out punitive license revocation sanctions under the guise of vague euphemistic labels – such as the generic formulation offered by the court of appeals – that the licensee is "no longer qualified."

Finally, the D.C. Circuit stated that "[r]evocation comes when the Commission concludes that the licensee can no longer be trusted to deal with it honestly, to follow its regulations, and to operate in the public interest."[31] That statement invokes what would be the only conceivable basis for a claim that the FCC's "character" revocation order in this case was remedial in nature – the claim that the FCC sought to "remedy" by prevention some unknown, hypothetical future FCC rule violation or act of dishonesty in dealing with the FCC that Michael Rice might someday commit in connection with his radio stations.[32] But to conclude from Mr. Rice's unrelated sexual misconduct that he somehow is likely in the future to violate FCC rules or be dishonest with the FCC is simply irrational. The D.C. Circuit itself has expressly so held in a prior decision.

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31 *Id.*

32 The FCC's revocation order was not "remedial" in any traditional sense. It was not designed to compensate anyone who had been injured by Mr. Rice's conduct. *See Bajakajian*, 524 U.S. at 329. It also was not designed to remove any dangerous item from society, or to compensate the government for the costs of an enforcement action. *See Austin*, 509 U.S. at 621.

In *Wilkett v. ICC*, 710 F.2d 861 (D.C. Cir. 1983), the D.C. Circuit held that unrelated personal criminal misconduct by the principal of a licensed business *cannot* rationally be found to predict a greater likelihood of business misconduct by the principal's regulated business. *Wilkett* involved a principal of a licensed trucking firm who had been convicted of drug trafficking and second degree murder. The Interstate Commerce Commission had ruled that "Wilkett's convictions were indicative of a predisposition on the part of the Company to violate trucking statutes and regulations." 710 F.2d at 864. The D.C. Circuit reversed that agency ruling, stating with accurate simplicity: "That conclusion is unreasonable." *Id.* So it is here too.[33]

Despite vague statements in the FCC's decision that Mr. Rice's unrelated sexual misconduct might give some "reason to be concerned" about unspecified possible future broadcast-related misconduct by Mr. Rice,[34] it is plain that the FCC *did not* – and also rationally *could not*, as the D.C. Circuit ruled in *Wilkett* – revoke Mr. Rice's broadcast authorizations because his past offenses supposedly presage possible future broadcast misconduct. The FCC revoked Mr. Rice's

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[33] The D.C. Circuit apparently found it impossible to distinguish its *Wilkett* decision, since the only manner in which the court was able to deal with the decision was by ignoring the pertinent portion of the *Wilkett* ruling which found no predictive value in a business principal's unrelated criminal offenses. *See D.C. Circuit Opinion*, 214 F.3d at 193-94 (App. A at 9a).

[34] *See FCC Decision*, 13 F.C.C. Rcd. at 14441-42 (¶10 – any felony "bears on our confidence that [the licensee] will conform to our rules and policies" & ¶11 – Mr. Rice's offenses "do, we believe, give us reason to be concerned about the propensity of the Licensees to comply with the Communications Act and FCC rules and policies") (App. B. at 29a-30a).

authorizations because it decided that Mr. Rice had committed crimes which the agency viewed as "egregious." *FCC Decision*, 13 F.C.C. Rcd. at 14442-46 (¶¶12-15) (App. B at 31a-36a). That is why the FCC repeatedly characterized Mr. Rice's sexual misconduct in the vernacular of moral outrage and opprobrium.[35]

That the FCC acted solely to punish Michael Rice and for no remedial purpose under the sun is clear from the FCC's own explanation of its character "policy" as applied to Mr. Rice in this case. Although the FCC began its explanation by asserting that "any felony conviction" has value in predicting future broadcast-related misconduct, it immediately backed away from that assertion by stating that "not all" felony

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[35] The FCC characterized Mr. Rice's offenses, for example, as "callous," "heinous crimes," acts of "moral turpitude," "repeated and long-term sexual abuse of children," and conduct that "shocks the conscience." *FCC Decision*, 13 F.C.C. Rcd. at 14442-45 (¶¶12 & 14-15) (App. B at 31a & 33a-36a); *FCC Reconsideration Order*, 14 F.C.C. Rcd. at 8792 (¶7) (App. C at 69a). The FCC also included in its decision an utterly gratuitous, prolonged reference to a case involving the abduction, rape and murder of a pre-adolescent child, a circumstance that scarcely bears comparison to Mr. Rice's offenses. *FCC Decision*, 13 F.C.C. Rcd. at 14444 (¶14) (App. B at 33a-34a).

The D.C. Circuit also succumbed to the temptation to heap scorn on Mr. Rice. In its opinion, the appeals court stated – taking serious liberties with the agency record – that Mr. Rice had engaged in the "repeated sexual assault of five children" and that it would be hard to "suggest what misconduct [one] would regard as more serious than that described in this record." *D.C. Circuit Opinion*, 214 F.3d at 195 (App. A at 12a). It is unclear what "record description" the appeals court had in mind, since the sole factual record before the Missouri court – and also before the FCC – consisted of five pages of stipulated testimony which scarcely support the D.C. Circuit's inflammatory characterization of Mr. Rice's misconduct. FCC Mass Media Bureau Hearing Exhibit 1 at 14-19 (stipulated testimony). See also note 15, *supra*.

convictions are "equally probative." *FCC Decision,* 13 F.C.C. Rcd. at 14441-42 (¶10) (App. B at 29a). The FCC then explained that, under its character "policy," it may – where the crime is "egregious" enough – order revocation of a broadcast license even if there *is no* connection "between the non-FCC criminal misconduct and the applicant's broadcast activities," and even if there *is no* "specific relationship to the applicant's truthfulness." *Id.* at 14442 (¶11) (App. B at 29a-30a).

Stated otherwise, the FCC said that if it finds the crime to be "egregious," it will revoke the license *for that reason alone.* Thus, the FCC's own explanation of its character "policy," as applied in this case, was that when faced with so-called "egregious" crime such as that of Mr. Rice, it is the *nature and seriousness of the crime itself,* and *not* its impact on FCC regulatory responsibilities, which form the entire basis for the FCC's decision to revoke a broadcast license. A simpler way to say the same thing would be: The penalty for Mr. Rice's "egregious" crimes is license revocation. It was that unalloyed determination to punish which alone prompted – by the FCC's own admission – the "character" revocation order that the FCC entered against Michael Rice in this case.[36]

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[36] Despite paying lip service to a feigned "concern" that Mr. Rice's unrelated sexual misconduct might possibly presage some unspecified future broadcast-related misconduct by Mr. Rice, the FCC – tellingly – ignored or rejected every single effort the Petitioners made to show that the Rice stations are, always have been and will remain well run, and that Michael Rice has made every possible effort to rehabilitate himself. The FCC rejected Petitioners' showing that the Rice stations all have good records, stating righteously that a good broadcast record "is not alone sufficient" to "mitigate the overwhelming negative weight" of Mr. Rice's "heinous crimes." *FCC Decision,* 13 F.C.C. Rcd. at 14444-46 (¶15) (App. B at 34a-36a). The FCC also affirmed its ALJ's rejection of Petitioner's evidence regarding the Rice stations' good standing in their communities, stating that it would "not consider meritorious programming" in cases involving "moral turpitude." *Id.* In addition, the FCC summarily affirmed its ALJ's rejection of evidence about the (Continued...)

Whether or not the FCC should use its license revocation powers to punish "egregious" non-broadcast misconduct, and whether or not the FCC has statutory authority to use its licensing powers as a launch pad for such a moral crusade, what quite plainly *is* true is that, to the extent the FCC elects to use its license and permit revocation powers as a means of inflicting punishment on wrongdoers due solely to the perceived "egregious" nature of their crimes, its actions are fully subject to the restraints imposed by the Eighth Amendment's prohibition of excessive fines. So much is not, Petitioners believe, legally arguable, given the Supreme Court's decisions in *Bajakajian* and *Austin*.

(...Continued)

extensive rehabilitative medical treatment that Mr. Rice has received, finding – inexplicably – that because Mr. Rice was "required by law" to undergo treatment while in prison, the fact that he did so has no significance. *Id.* at 14445 n.3 (App. B at 35a-36a). Mr. Rice was not, of course, "required by law" to spend three years under Dr. Stillings' care prior to his conviction and incarceration, or to resume that care after he was released from prison in 1999, but the agency apparently had no interest in those proofs of rehabilitation either. Indeed, the FCC even ruled, *id.* at 14445 (¶15) (App. B. at 34a-36a), that the testimony Petitioners submitted about Mr. Rice's overall good character – testimony given by people who *actually know* Michael Rice – was "insufficient," because those character witnesses made the fatal "mistake" of testifying only about the things they were competent to address under the federal rules of evidence, Mr. Rice's character and reputation, instead of something they clearly were *not* competent testify about, the so-called "heinous" nature of his crimes – which was the only thing, it would appear, the FCC had any real interest in hearing about. By its rhetoric, its reasoning and its uniform rulings rejecting Petitioners' efforts to prove that Mr. Rice's unrelated sexual misconduct posed no threat to the proper operation of the Rice stations, the FCC plainly revealed that its true purpose in the case was to punish Michael Rice – to drum him out of the broadcasting business – due to the perceived "egregious" nature of his crimes.

The holding of the D.C. Circuit to the contrary should be reviewed and reversed by this Court.

II.

THE QUESTION PRESENTED IS IMPORTANT

Whether a federal administrative license and permit revocation is subject to the fundamental constitutional constraint imposed by the Eighth Amendment on excessive government-imposed penalties is an important constitutional question – one worthy of the Supreme Court's consideration. Petitioners believe that this case is important for another reason as well. This case involves the life of a human being. The Jewish proverb quoted in the film *Schindler's List* states: "He who saves one life saves the entire world." This case involves the life of Michael Rice.

Michael Rice has spent his entire career in radio broadcasting. Radio is his life. Mr. Rice is not married and has no children. His parents are both deceased. His life and his family are his radio business. He has spent his life building that business, following the profession he loves. The FCC's revocation order will take from Mr. Rice not merely radio licenses worth millions of dollars. It will take from him the ability to practice his life-long profession, to do what he cares most for and is best at, and to do the one thing by which he is best able to contribute value to our society.

Because the FCC's revocation order has effectively branded Mr. Rice unfit to perform in a responsible capacity at a radio station, Mr. Rice will find it difficult if not impossible to secure meaningful employment elsewhere in the broadcast industry. Given the FCC's ruling that Mr. Rice is unfit to be a broadcaster, another FCC licensee would risk losing its own license by placing Mr. Rice in a position of responsibility at a radio station. The FCC's order will thus take from Michael

Rice not only the work of his entire lifetime until now, but also the opportunity to continue in the profession he has followed with distinction his entire life.

If the FCC's revocation order stands, Mr. Rice's mental and physical health will also be in jeopardy in the opinion of Mr. Rice's psychiatrist of the past ten years, Dr. Wayne Stillings. In a letter which Dr. Stillings directed to the FCC while this case was pending before the D.C. Circuit, Dr. Stillings stated:

> At all times while under my care, Mr. Rice has worked diligently to pursue the recommended course of treatment. He has thereby remained in a healthy mental state for many years, and his prospects for continued good mental health would be excellent in my opinion, were it not for the potential that his radio licenses may be revoked. I am very concerned that a revocation of Mr. Rice's radio licenses will seriously jeopardize Mr. Rice's medical condition and will place all of the improvement he has managed to achieve at significant risk.
>
> . . . .
>
> In my experience, a primary goal of our criminal justice system, especially when psychiatric issues are involved, is to rehabilitate individuals so that they may become law abiding, contributing members of our society. Mr. Rice has been entirely successful over the past ten years in rehabilitating himself in this manner, but the loss of his radio licenses could seriously jeopardize this favorable outcome. In this sense, the revocation of his radio licenses would seem to me to work at cross purposes to

> this fundamental goal of our criminal justice system – rehabilitation.[37]

It is unfortunately probable that Michael Rice's fate was sealed in the eyes of the FCC before his case was ever considered by that agency. Mr. Rice's offenses violated tenets of morality that are deeply seated in our society. Under such circumstances, it was probably impossible, from the outset, for Mr. Rice to receive a dispassionate decision from a federal administrative agency headed up by political appointees. In such a forum, the prospect of permitting a sex offender to retain his radio stations was almost certainly not merely "politically incorrect" but politically unthinkable, no matter that the offenses had nothing to do with Mr. Rice's radio stations, and no matter that they resulted from serious biologically and genetically-based psychiatric disorders – disorders that Michael Rice has worked valiantly and successfully to overcome during the past ten years.

This Court has a long and distinguished history of hearing cases to protect the constitutional rights of the solitary and unpopular in our society, and to vindicate the principle that the rights of the weak and the outcast are no less than those we all enjoy. An important reason why the Supreme Court should hear this case is to vindicate, again, that important principle.

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[37] August 10, 2000 Letter of Dr. Wayne A. Stillings to Daniel Armstrong, Esq., Office of the General Counsel, Federal Communications Commission. Petitioners are prepared to demonstrate fully the truth of all of the statements made above, and to present Dr. Stillings as a witness before the FCC, so that his expert medical knowledge and opinion regarding Michael Rice can be fully considered, in an appropriate FCC hearing on the Eighth Amendment issue in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted

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Dated: December 13, 2000

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 18, 2000 Decided June 16, 2000

No. 99-1198

CONTEMPORARY MEDIA, INC., ET AL.,
APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION
APPELLEE

Appeal of an Order of the
Federal Communications Commission

Before: SILBERMAN, HENDERSON, and GARLAND, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge:* Three radio licensees appeal the Federal Communications Commission's (FCC'S) revocation of their licenses and construction permits, as well as its denial of their application for a new station. The FCC took those actions after the licensees' sole owner and president was convicted of sexually abusing children, and after the licensees made misrepresentations to the Commission about the owner's continued involvement in station affairs. In the end, the case is no more difficult than this recitation of the facts suggests, and we therefore affirm the FCC in all respects.

I

The appellant licensees own and operate five radio stations in Missouri and Indiana, hold two construction permits for radio stations in Missouri, and have an application pending for another Missouri station. Michael Rice is the sole shareholder, president, and treasurer of all three licensees and serves on each licensee's board of directors. In November 1990, Rice was arrested for criminal conduct involving sexual acts with a teenager. In April of the following year, he was formally charged with three felony counts of sexual assault on an individual between fourteen and sixteen years of age. The prosecutor subsequently amended the charges to include eight felony counts of sexual assault on individuals between fourteen and sixteen years of age, and four felony counts of forcible sodomy of individuals under fourteen years of age. The sexual abuse involved five children and occurred between December 1985 and October 1990. Two days after the charges were filed, Rice checked himself into a St. Louis hospital for in-patient psychiatric treatment.

In June 1991, two of the licensees filed reports notifying the FCC of the charges against Rice. The reports were filed pursuant to 47 C.F.R. § 165(a), which requires FCC license applicants to maintain "the continuing accuracy and completeness of information furnished" in pending applications. Each report stated that:

> Since Mr. Rice's hospitalization on April 3, 1991, he has had absolutely no managerial, policy, or consultative role in the affairs of the three broadcast corporations in which he has ownership interests and officer positions. In other words, pending a resolution of the referenced criminal charges, Mr. Rice is being completely insulated and excluded from any involvement in the managerial, policy, and day-to-day decisions involving any of the four licensed stations and three construction permits held by the three corporations.

J.A. at 15-16, 120 (citation omitted). In October 1991, Rice was discharged from the hospital. On May 14, 1992, one of the licensees filed another report with the FCC, stating:

> There has been no change in Mr. Rice's status with [the reporting licensee] or in the status of the proceedings against him..... Mr. Rice is no longer hospitalized, but he continues to be treated by his physicians as an outpatient, and he continues to have no managerial or policy role in the affairs of the three broadcast corporations ... in which he has ownership interests and corporate positions.

Id. at 126-27 (citation omitted).

On August 31, 1994, Rice was convicted of all twelve felony counts against him: four counts of forcible sodomy, six counts of deviate sexual assault in the first degree, and two counts of deviate sexual assault in the second degree. The court sentenced him to a total of eighty-four years in

prison. Because the sentences were set to run concurrently, his maximum term of confinement amounted to eight years. Rice began his incarceration on September 30, 1994, and is currently eligible for release.

On October 10, 1995, the FCC ordered an evidentiary hearing at which the licensees were directed to show cause why their licenses and construction permits should not be revoked and their pending application denied. The central issues at the hearing were: (1) the effect of Rice's felony convictions on the basic character qualifications of the licensees, and (2) whether the licensees had misrepresented to the FCC that, subsequent to his arrest, Rice had been excluded from the management and operation of the stations. After the hearing, the Administrative Law Judge (ALJ) concluded that revocation of the licensees' authorizations was appropriate due to the egregious nature of Rice's misconduct and to the misrepresentations made by the licensees in their reports to the Commission. The FCC affirmed.

II

The licensees' appeal raises a number of challenges, which we address in turn. First, they challenge the legality of the character policy upon which the FCC's decision was based. We must sustain that policy unless we find it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A); *see ACLU v. FCC,* 823 F.2d 1554, 1574 (D.C. Cir. 1987).[1]

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[1] The licensees rely on our decision in *Bechtel v. FCC,* 10 F.3d 875 (D.C. Cir. 1993), which stated that agencies must be prepared to defend the underlying validity of policy statements because those statements "are exempt from the Administrative Procedure Act's notice-and-

(Continued...)

Section 308(b) of the Federal Communications Act provides that "[a]ll applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, ... and other qualifications of the applicant to operate station" 47 U.S.C. § 308(b). For many years, the FCC had no express policy concerning the character qualifications of its applicants; the Commission considered a wide range of factors in evaluating character, and as a consequence its evaluations sometimes yielded inconsistent results. *See Policy Regarding Character Qualifications in Broadcast Licensing,* 87 F.C.C. 2d 836-37 (1981)(notice of inquiry). The Commission responded to this problem in 1986 with the adoption of a comprehensive character policy statement. *See Policy Regarding Character Qualifications in Broadcast Licensing,* 102 F.C.C.2d 1179 (1986) [hereinafter *1986 Character Policy Statement*]. The statement announced that the FCC's character analysis would focus on "misconduct which violates the Communications Act or a Commission rule or policy, and . . .certain specified non-FCC misconduct which demonstrate[s] the proclivity of an applicant to deal truthfully with the Commission and to comply with [its] rules and policies." *Id.* at 1190-91. The relevant non-FCC misconduct was limited to adjudicated cases involving: fraudulent representations to government agencies, criminal false statements or dishonesty, and broadcast-related violations of antitrust laws or other laws concerning competition. *See id.* at 1195-1203. The FCC noted, however, that "there may be circumstances in which an applicant has engaged in nonbroadcast

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(...Continued)

comment requirements and hence may take effect without the rigors-and presumed advantages-of that process." *Id.* at 878 (citation omitted). Because we conclude that the FCC did adequately justify its policies in the decision under review, *Bechtel* does not affect our analysis.

misconduct so egregious as to shock the conscience and evoke almost universal disapprobation." *Id.* at 1205 n.60. "Such misconduct," the Commission stated, "might, of its own nature, constitute *prima facie* evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee, and might be a matter of Commission concern even prior to adjudication by another body."" *Id.*[2] The 1986 statement also listed mitigating factors that the Commission would consider in evaluating specific acts of misconduct. *See id.* at 1227-28.

In 1990, the FCC determined that its 1986 policy had taken "an overly narrow view of the range of misconduct that should be relevant in licensing decisions." *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 F.C.C.R. 3252, 3252 (1990) [hereinafter *1990 Character Policy Statement*]. It therefore amended that policy with a new statement, which explained:

> [U]pon further reflection, we believe a propensity to comply with the law generally is relevant to the Commission's public interest analysis, and that an applicant's or licensee's willingness to violate other laws, and, in particular, to commit felonies, also bears on our confidence that an applicant or licensee will conform to FCC rules and policies. . . . Thus, evidence of any conviction for misconduct constituting a felony will be relevant to our analysis of an applicant's or licensee's character.

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[2] In addition, the FCC explicitly reserved the option of expanding the range of relevant misconduct "[s]hould [its] future experience indicate that [it had] erred ... in narrowing the range of non-FCC misconduct to be considered for character purposes." *1986 Character Policy Statement*, 102 F.C.C.2d at 1208 n.75.

Id. The FCC further stated that although "not all convictions for serious crimes are equally probative" of propensity to obey the law, it would not "establish a 'hierarchy' of felonies that may arise in individual cases." *Id.* Rather, the Commission would analyze misconduct on a case-by-case basis through the examination of mitigating factors. As in 1986, the Commission stated that for non-FCC conduct it generally would consider only adjudicated cases. However, it "continue[d] to believe that, where an applicant has allegedly engaged in nonbroadcast misconduct 'so egregious as to shock the conscience and evoke almost universal disapprobation,' such conduct 'might be a matter of Commission concern even prior to adjudication by another body.'" *Id.* at 3252 n.5 (quoting *1986 Character Policy Statement,* 102 F.C.C.2d at 1205 n.60).

The licensees' challenge to the legitimacy of the current character policy is threefold. First, they contend that there is "no justification for license revocation based on non-FCC-related criminal misconduct of a licensee's principal, even if such misconduct was 'egregious.'" Br. of Appellants at 17. According to the licensees, such revocation is particularly inappropriate in this case because "there was *no nexus* between Mr. Rice's sexual misconduct and the Licensees' broadcast activities." *Id.* at 16 (emphasis in original).

We disagree, both as a general matter and with regard to the specifics of this case. As to the former, it should be noted that the FCC's policy is not automatically to disqualify a license holder or applicant who commits a felony, but rather to consider the felony as a relevant factor in evaluating propensity to obey the law. *See 1990 Character Policy Statement,* 5F.C.C.R. at 3252. We see nothing irrational in the conclusion that the violation of the criminal laws is relevant to that evaluation and to the issue of character in general. *See generally DiCola v. FDA,* 77 F.3d 504, 507-08 (D.C. Cir. 1996). The FCC relies heavily on the honesty and

probity of its licensees in a regulatory system that is largely self-policing. *See Leflore Broad. Co. v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980) ("[E]ffective regulation is premised upon the agency's ability to depend upon the representation made to it by its licensees. . . ."). Under such a regime, a felony conviction--any felony conviction—is certainly a factor to be considered. It may not necessarily be a dispositive factor, and all such convictions may not be equally probative—as the FCC recognizes. *See 1990 character Policy Statement*, 5 F.C.C.R. at 3252. But it is hard to see the argument that a felony conviction is not relevant at all.

In this case, moreover, the argument is particularly weak. It is hardly irrational to conclude that if an individual is unwilling to obey the law with respect to such patently criminal behavior as sexual assault on children, he will be equally unwilling to obey FCC rules that require openness and honesty with the Commission. Indeed, as discussed below, that connection was borne out in this case. Because the policy of considering felonious misconduct was clearly permissible as applied to the licensees, they cannot succeed in their attempt to challenge it on its face. *Cf. Romer v. Evans*, 517 U.S. 620, 643 (1996); *Steffan v. Perry*, 41 F.3d 677, 693 (D.C. Cir. 1994) (en banc).

Second, the licensees argue that the FCC's character policy is arbitrary and capricious because it does not provide any criteria for determining which non-FCC-related misconduct is sufficiently serious to affect a licensee's propensity for reliability in its dealings with the agency. Given the myriad forms of criminal misconduct, the FCC's decision is not unreasonable. The Commission cannot be required to foresee the variety of criminal behavior in which licensees or their owners may partake. And once again, whatever the issue with respect to crimes that might be regarded as being on the boundary of "egregiousness," the

reasonableness of the FCC's decision in the instant case is clear. There is no question but that the crimes at issue here are, as the FCC found, "characterized by moral turpitude" to such an extent that they "fall[ ] in the category of those that 'shock the conscience' and summon almost universal disapproval," *Contemporary Media, Inc.* 13 F.C.C.R. 14,437, 14,444 (1998)—a category that the FCC expressly warned would be the subject of special agency concern. *See 1990 character Policy Statement,* 5 F.C.C.R. at 3252. n.5.

The licensees' third contention is that the FCC's character policy is inconsistent with the precedent of both this circuit and the Commission itself. The licensees cite *Wilkett v. ICC,* in which this court reversed a license revocation based on the sole proprietor's convictions for second-degree murder and conspiracy to distribute a controlled substance. *See* 710 F.2d 861 (D.C. Cir. 1983). That case, however, is readily distinguishable. In *Wilkett*, the court's analysis focused on the fact that the Interstate Commerce Commission had "disregarded its own standards for evaluating [licensee] fitness." *Id.* at 864. The court found that the Commission had failed to "carefully scrutinize[ ] the past violations and consider[ ] mitigating circumstances," as it had in "numerous cases" in the past. *Id.* Here, by contrast, the FCC not only gave careful consideration to Rice's crimes, but it did so pursuant to and in accordance with its published character policy. After scrutinizing the misconduct at issue, the FCC concluded that it was "extremely serious" and involved "numerous acts." *Contemporary Media,* 13 F.C.C.R. at 14,444. Then, as discussed below, the Commission closely evaluated the licensees' claims of mitigation and reasonably rejected them. Moreover, the convictions were not the sole ground for the revocation decision as they were in *Wilkett*; here the licensees were also found to have violated the Commission's candor requirements in connection with the very matter now before us.

The licensees also cite *Kravis Co.*, 11 F.C.C.R. 4740 (1996), in which the FCC renewed radio licenses despite the fact that the company's president and sole shareholder had been charged with possession and exhibition of child pornography. As the Commission explained in its decision below, however, in that case neither a conviction nor a judgment of guilt had been entered against the defendant; instead, the court had placed him on probation pursuant to the state's deferred judgment procedure, which permitted the expungement of the charges after successful completion of the probation period. *See Contemporary Media,* 13 F.C.C.R. at 14,442-43. As noted above, the FCC's character policy states that the Commission generally will consider only instances of adjudicated misconduct. *See 1990 Character Policy Statement,* 5 F.C.C.R. at 3252. Regardless of whether it would be reasonable to erase that line, it is not unreasonable to draw it.[3]

III

Having found no merit to the licensees' challenges to the FCC's character policy itself, we now consider their challenges to the application of that policy in this case. The licensees argue that even if the character policy is legitimate, the Commission erred both in failing to consider numerous mitigating factors that are relevant under the policy, and in

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[3] The licensees seek further support from *Alessandro Broadcasting Co.*, in which the FCC determined that no demerit was warranted for an applicant whose majority shareholder had been convicted of second-degree murder. *See* 99 F.C.C.2d 1 (1984). That decision, however, was rendered before the Commission's 1990 character policy statement gave import to felonies unrelated to dishonesty or broadcast-industry conduct. Moreover, in *Alessandro,* the agency noted that "the crime was an isolated event that occurred in the remote past and the state authorities connected with [the] conviction . . . [had] determined officially that [the shareholder was] rehabilitated and [had] restored his civil rights." *Id.* at 11 n.13. None of those factors is present in this case.

concluding that the licensees misrepresented Rice's continued involvement in station affairs. We address each argument below. Once again, we are mindful that we must sustain the FCC's order unless the challenged action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and that we must uphold its findings of fact if they are supported by substantial evidence, *see id.* § 706(2)(E); *Damsky v. FCC*, 199 F.3d 527, 533 (D.C. Cir. 2000).

A

The FCC's character policy sets forth a number of mitigating factors to be considered in evaluating misconduct: "the willfulness of the misconduct, the frequency of the misconduct, the currentness of the misconduct, the seriousness of the misconduct, the nature of the participation (if any) of managers or owners, efforts made to remedy the wrong, overall record of compliance with FCC rules and policies, and rehabilitation." *1990 Character Policy Statement*, 5 F.C.C.R. at 3252. Although the FCC credited the licensees' record of regulatory compliance, it rejected all of the other potential bases for mitigation. We agree with the FCC's judgment; indeed, it is hard to regard most of the licensees' contrary arguments as anything but insubstantial.

First, the licensees note that although Rice could have been sentenced to eighty-four years in prison, he was instead sentenced to concurrent terms of "only" eight years. Br. of Appellants at 21. We do not understand the argument. We have no idea, and the licensees have offered none, as to why the state court showed such mercy. Indeed, we have no idea whether it did show mercy—that is, whether the court had sentencing discretion, or whether Rice's crimes were subject to state sentencing laws or guidelines that dictated the sentence he received. Furthermore, we do not regard a sentence of "only" eight years as indicating that Rice's

felonies were somehow "less serious," or that the sentencing court found them so. And finally, we do not understand how the repeated sexual assault of five children could be regarded as anything less than egregious; perhaps wisely, licensees do not suggest what misconduct they would regard as more serious than that described in this record.

Second, the licensee argue that they were entitled to benefit from the "participation of management or owners" mitigation factor. Again, we do not understand the argument. Although it is true that no other "owner" participated in Rice's misconduct, it is only true because there is no other owner: Rice owns all of the equity in each of the licensees. Nor was Rice a minor player in management; he was the president of all of the licensees and sat on the board of directors of each. And while the other corporate managers did not participate in the sexual assaults for which Rice was convicted, they did—as we discuss below—participate in other serious misconduct: namely, intentional misrepresentations to the FCC regarding Rice's continued role.

Third, the licensees appeal to the "rehabilitation" factor, observing that the record contains no evidence of criminal activity subsequent to October 1990, and claiming that Rice's sexual misconduct ceased on that date. The lack of further misconduct after October, however, is hardly coincidental. In November, Rice was arrested on the assault charges. His forbearance from criminal activity during the period in which he awaited trial and was subject to the conditions of pretrial release is hardly indicative of rehabilitation.[4] Moreover, again as discussed below, the evidence shows that he participated in intentional

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[4] It goes without saying that Rice's forbearance while in prison is not indicative of rehabilitation at all.

misrepresentations to the FCC during this supposed rehabilitation period.

Fourth, the licensees point to Rice's "reputation in the community," noting that "four individuals who have known Mr. Rice personally and/or professionally for many years" submitted statements attesting to his good character and reputation. Br. of Appellants at 22. The ALJ properly refused to credit these statements, however, since only one mentioned Rice's felony conviction and none expressed any familiarity with its details. We cannot fault the FCC for concluding that those who vouched for Rice's character while evidencing little if any knowledge of his egregious acts cannot be regarded as credible on the subject.

Finally, the licensees complain that the FCC failed to award mitigation credit for the measurers they took to prevent Rice from engaging in future misconduct, while simultaneously allowing him to "rehabilitate" himself through gainful employment. The licensees emphasize that they adopted resolutions prohibiting Rice from having any "managerial, policy, or consultative role" in their affairs, but that they also permitted him some "limited participation" in accordance with his physician's recommendations. *Id.* at 23-24. The problem with this argument is that the FCC concluded it was factually untrue, finding that Rice participated extensively in station affairs even after the resolutions were passed and that the licensees intentionally misrepresented that participation. As discussed in Part III.B below, we find substantial evidence to support the FCC's findings in this regard. The actions taken by the licensees, therefore, become elements of aggravation rather than mitigation.

In sum, we find no error in the FCC's evaluation of possible mitigating factors. The FCC considered each of the relevant factors set forth in its character policy, and it

reasonably rejected all save one—the licensees' "overall record of compliance with FCC rules and policies." We agree with the Commission's conclusion that "[t]he fact that the Licensees have had a good overall record of FCC rule compliance is not alone sufficient to mitigate the overwhelming negative weight of all the other evidence" in this case. *Contemporary Media,* 13 F.C.C.R. at 14,445.

At oral argument, the licensees conceded that if we were to sustain the FCC's finding of intentional misrepresentation that alone would be sufficient ground for the revocation of their licenses. That concession was plainly correct, as "it is well recognized that the Commission may disqualify an applicant who deliberately makes misrepresentations or lacks candor in dealing with the agency." *Schoenbohm v. FCC,* 204 F.3d 243, 247 (D.C. Cir. 2000); *see also FCC v. WOKO, Inc.* 329 U.S. 223, 225-27 (1946); *Swan Creek Communications, Inc. v. FCC,* 39 F.3d 1217, 1221-24 (D.C. Cir. 1994); *Garden State Broad. Ltd. v. FCC,* 996 F.2d 386, 393-94 (D.C. Cir. 1993). We now turn to an examination of that issue

The ALJ found, and the FCC affirmed, that the licensees "misrepresented and lacked candor in reporting to the Commission that, subsequent to his arrest, Rice was completely excluded from any further involvement in the management and operation of the Licensees' radio stations." *Contemporary Media,* 13 F.C.C.R. at 14,454; *see Contemporary Media, Inc.,* 12 F.C.C.R. 14,254, 14,295 (1997) (initial decision of ALJ). The licensees counter by claiming that they never promised "to completely exclude Mr. Rice from having any involvement in their stations' activities, only to exclude him from having any involvement in the management, policy, and day-to-day *decisions* involving the stations." Br. of Appellants at 25 (emphasis in original). They admit that this distinction is "subtle." *Id.* That is an understatement.

As previously recounted, in June 1991 the licensees reported to the FCC that:

> *Since Mr. Rice's hospitalization on April 3, 1991, he has had absolutely no managerial, policy, or consultative role in the affairs of the three broadcast corporations* in which he has ownership interests and officer positions. In other words, pending a resolution of the referenced criminal charges, Mr. Rice is being completely insulated and excluded from any involvement in the managerial, policy, and day-to-day decisions involving any of the four licensed station and three construction permits held by the three corporations.

J.A. at 15-16, 120 (citation omitted) (emphasis added). There is no dispute that from April until October 1991, the period of his hospitalization, Rice had no involvement with the stations. The licensees concede, however, that several weeks after Rice's release from the hospital, their vice-president permitted him to undertake a number of station-related tasks, which they describe as "occasional and isolated technical projects." Br. of Appellants at 26. Nonetheless, the next report to the FCC, filed on May 14, 1992, stated:

> *There has been no change in Mr. Rice's status with [the reporting licensee] or in the status of the proceedings against him.* . . . Mr. Rice is no longer hospitalized, but he continues to be treated by his physicians as an outpatient, and *he continues to have no managerial or policy role in the affairs of the three broadcast corporations* . . . in which he has ownership interests and corporate positions.

J.A. at 126-27 (citation omitted) emphasis added).

According to the licensees, Rice's conceded involvement in "technical projects" is consistent with this representation because that involvement did not comprise managerial or

decision-making activities but rather "mere opining and musings." Br. of Appellants at 28. The key point that the "hypertechnical" FCC overlooked, they claim, is that the May 1992 report deleted the word "consultative" from the list of roles from which the June 1991 report had said Rice was being excluded. *Id.* at 26. In their eyes, this "critical distinction" between the two reports should have put the Commission on notice that Rice had moved from having no role to having an "opining and musing" role. *Id.* at 27. Indeed, the licensees maintain that this distinction rendered their representations "fully forthcoming" and candid. *Id.* at 26.

By this time, it should be quite clear who is being "hypertechnical" only a side-by-side line comparison of the two filings—conducted with some skepticism of the licensees' candor—would have detected the subtle different in language upon which the licensees now rely. In 1992, however the FCC had no reason to conduct such a forensic comparison of the two representations, particularly in light of the May report's opening declaration that "[t]here has been no change in Mr. Rice's status." That declaration, alone, was plainly false.[5]

Moreover, even if we were to accept that the licensees effectively advised the Commission that Rice was involved in consultation but had no role in management, there is substantial evidence in the record that Rice was involved in management as well. *Cf. WBER, Inc. v. FCC,* 420 F.2d 158, 164 (D.C. Cir. 1969) (holding that questions regarding misrepresentations are factual questions subject to substantial evidence review). As the ALJ stated:

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[5] At oral argument, the licensees argued that their intention was only to indicate that there had been no change in Rice's "ownership or managerial" status. The quoted words, however, do not appear in the declaration, which was completely unqualified.

> Apart from Rice's consultative role, the evidence establishes that, after his release from the hospital in October 1991, Rice was also involved in at least some of the programming matters and personnel decisions of the Licensees, rejected offers to purchase one of the Licensee's construction permits, invited an offer to purchase a station once it went on the air, suggested the trade of specific broadcast properties, and directed the group program director and two of the general managers of the Licensee's stations to perform certain tasks.

Contemporary Media, 12 F.C.C.R. at 14,298.

The licensees contend that there was only "conflicting" evidence on these matters, pointing out that their witnesses disputed much of the testimony upon which the ALJ's conclusions were based. As a consequence, they argue, "[w]itness credibility findings played a predominant role in the ALJ's and the FCC's adverse ruling under the misrepresentation issue." Br. of Appellants at 30. It is true, of course, that when witnesses present conflicting testimony an agency's decision must be based on an evaluation of their credibility. Under our precedents, however, we defer to credibility findings affirmed by the Commission unless they are "patently unsupportable." *E.g., SL Communications, Inc. v. FCC,* 168 F.3d 1354, 1357 (D.C. Cir. 1999). That is not the case here.

Finally, the licensees contend that "intent to deceive" is a necessary element of proving misrepresentation nor lack of candor in FCC proceedings, *see Swan Creek Communications*, 39 F.3d at 1222; *Fox River Broad, Inc.* 93 F.C.C.2d 127, 129 (1983), and that there is no credible record evidence of any intent on their part to mislead or deceive the agency. The evidence discussed above, however, is more than sufficient to support Commission's finding that there was an intent to deceive. As we have

stated before, "the fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity [is] enough to justify a conclusion that there was fraudulent intent." *Leflore Broad. Co.*, 636 F.2d at 462. The licensees concede that they intentionally deleted the word "consultative" from the 1992 filing, and we cannot credit the claim that they did not realize the resulting report would affirmatively mislead the agency as to Rice's resumption of such activities. Moreover, as noted above, there is substantial evidence that the licensees' representations concerning Rice's exclusion from non-consultative (i.e., managerial and policy) activities were themselves false. There is also substantial evidence that the licensees' management knew the representations were false, since management was on the receiving end of Rice's directives.[6] Accordingly, we uphold the FCC's finding of intent to deceive, and with it the Commission's determination that the licensees' misrepresentations warranted revocation.

IV

Finally, we turn to the licensees' contention that the revocation of their licenses and construction permits violates

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[6] To take just a few examples:

> Rice informed [vice president] Cox that he wanted Rhea [the general manager of two of his radio stations] fired, and Cox told Rhea that he was being fired because of Rice's displeasure . . .; Cox told Rhea that Rice wanted [radio announcer] Steel fired after Steel changed [his station's] reporting status in a trade publication; after Rice asked Rhea for information about the cost of the Satellite Music Network, Cox told Rhea that Rice thought [one of the stations] could be programmed for less money by bringing in Rice's own music; and Leatherman [the general manager of another licensee station] responded to Cox after Rice asked him about the need for sound effect CDs.

Contemporary Media, 13 F.C.C.R. at 14,458

the Excessive Fines Clause of the Eighth Amendment.[7] In support of this contention, the licensees cite *Austin v. United States,* which held that the Excessive Fines Clause applies to forfeiture under 21 U.S.C. § 881(a)(4) and (a)(7) of property used to facilitate drug transactions. *See* 509 U.S. 602, 604 (1993). *Austin* has no application here.

In *Austin,* the Court held that the central question under the Excessive Fines Clause is whether the government action at issue is "punishment for some offense." *Id.* at 609-10; *see United States v. Bajakajian,* 524 U.S. 321, 327-28 (1998). In concluding that the forfeitures in that case constitute punishment, the Court focused on the historical understanding of forfeiture as a penal measure, an understanding reflected in prior Supreme Court precedents and in the legislative history of the forfeiture statute. *See Austin,* 509 U.S. at 614-20.

These considerations do not apply to the case at bar. First, the Court's precedents do not reflect an understanding that FCC license revocations or nonrenewals based on character considerations constitute punishment. To the contrary, in *FCC v. WOKO,* the Court rejected just such a claim. *See* 329 U.S. at 228. There, an FCC licensee who had made misrepresentations to the agency contended that the resulting nonrenewal order "inflict[ed] a penalty, that the motive [was] punishment." *Id.* The Court disagreed, stating: "A denial of an application for a license because of the insufficiency or deliberate falsity of information lawfully required to be furnished is not a penal measure." *Id.* Nor have the licensees cited anything in the legislative history of the Federal Communications Act to suggest that Congress had a punitive purpose.

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[7] *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed. . . .").

The FCC revokes a license not to punish a licensee for its conduct, but because that conduct indicates to the Commission that the licensee is no longer qualified to hold it. *See* 47 U.S.C. §§ 303(*l*), 308, 312; *Contemporary Media*, 13 F.C.C.R. at 14,459-60. Revocation comes when the Commission concludes that the licensee can no longer be trusted to deal with it honestly, to follow its regulations, and to operate in the public interest. *See, e.g., Syracuse Peace Council v. FCC*, 867 F.2d 654, 659 n.2 (D.C. Cir. 1989); *Leflore Broad. Co.*, 636 F.2d at 461-62. While the revocation of FCC license privileges "may hurt and . . . . may cause loss," WOKO, 329 U.S. at 228, the does not implicate the Excessive Fines Clause of the Eighth Amendment.

V

For the foregoing reasons, we affirm the decision and order of the Federal Communications Commission.

APPENDIX B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	MM Docket No. 95-154
	)	
CONTEMPORARY MEDIA, INC.	)	
	)	
Licensee of Stations WBOW(AM), WBFX(AM), and WZZQ(FM), Terre Haute, Indiana	)	
	)	
Order to Show Cause Why the Licenses for Stations WBOW(AM), WBFX(AM), and WZZQ(FM), Terre Haute, Indiana, Should Not be Revoked	)	
	)	
CONTEMPORARY BROADCASTING, INC.	)	
	)	
Licensee of Station KFMZ(FM), Columbia, Missouri, and Permittee of Station KAAM-FM, Huntsville, Missouri (unbuilt)	)	
	)	
Order to Show Cause Why	)	

the Authorizations for Stations KFMZ(FM), Columbia, Missouri and KAAM-FM, Huntsville, Missouri, Should Not be Revoked	)	
LAKE BROADCASTING, INC.	)	File No. BPH-921112MH
Licensee of Station KBMX(FM), Eldon, Missouri, and Permittee of Station KFXE(FM), Cuba, Missouri	)	
Order to Show Cause Why the Authorizations for Stations KBMX(FM), Eldon, Missouri, and KFXE(FM), Cuba, Missouri, Should Not be Revoked	)	
LAKE BROADCASTING, INC.	)	
For a Construction Permit for a New FM Station on Channel 244A at Bourbon, Missouri	)	

Appearances

Howard J. Braun, Jerold L. Jacobs, Shelley Sadowsky and Michael D. Gaffney on behalf of Contemporary Media, Inc., Contemporary Broadcasting, Inc., and Lake Broadcasting, Inc.; and James W. Shook,

Jamila Bess Johnson and Roy W. Boyce on behalf of the Mass Media Bureau.

DECISION

Adopted: June 22, 1998; Released: June 25, 1998

By the Commission:

I. INTRODUCTION

1. this Decision affirms the Initial Decision, 12 FCC Rcd 14254 (ALJ 1997 ("I.D."), of Administrative Law Judge Arthur I. Steinberg (ALJ). The I.D. revoked the licenses and construction permits held by Contemporary Media, Inc. ("CMI"), Contemporary Broadcasting, Inc. ("CBI"), and Lake Broadcasting, Inc. ("Lake") (collectively, "Licensees"), and denied Lake's application for a new station, because of violations of law relating to repeated sexual abuse of children by the stations' sole owner and misrepresentations by the Licensees.

2. By Order to Show Cause and Notice of Apparent Liability ("OSC"), 10 FCC Rcd 13685 (1995), the Commission specified the following issues for hearing:

> (1) To determine the effect of Michael Rice's convictions on the basic qualifications of CMI, CBI, and Lake.
>
> (2) To determine whether CMI, CBI, and Lake misrepresented to the Commission that, subsequent to his arrest, Michael Rice has been excluded from the management and operation of the CMI, CBI, and Lake radio stations.

> (3) To determine, pursuant to Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540 of the Commission's Rules, whether Michael Rice has engaged in the unauthorized transfer of control of CMI, CBI, and Lake.
>
> (4) To determine, in light of the evidence adduced under the foregoing issues, whether CMI, CBI, and/or Lake, possess the requisite qualifications to be or remain licensees of their respective radio stations.

The OSC further stated that, if the hearing record did not warrant revocation of the Licensees' authorizations, it would be determined whether an order of forfeiture should be issued pursuant to Section 503(b) of the Act.

3. The I.D. concluded that, although there was no unauthorized transfer of control, Michael Rice's felony convictions and the Licensees' misrepresentations and lack of candor regarding his role at the stations constituted separate and independent grounds for disqualification of the Licensees. In view of this conclusion, the ALJ determined that all of the Licensees' authorizations should be revoked, and that issuance of a forfeiture was therefore unwarranted. The Licensees except to the ALJ's adverse conclusions under the violations of law and misrepresentation issues and to the revocation of its licenses and construction permits; at most, the Licensees argue that a monetary forfeiture under the misrepresentation issue would have been adequate. The Mass Media Bureau supports the I.D. in all respects. The Licensees also seek oral argument. This request is denied because we do not believe such argument would materially assist our resolution of this proceeding.

II. VIOLATIONS OF LAW ISSUE

Background

4. Michael Rice is the sole shareholder of CMI, which is the licensee of Stations WBOW(AM), WZZQ(AM) (formerly WBFX(AM)), and WZZQ(FM), Terre Haute, Indiana. CBI, which is a wholly-owned subsidiary of CMI, is the licensee of Station KFMZ(FM), Columbia, Missouri, and the permittee of Station KAAM-FM, Huntsville, Missouri. Rice also owns all the issued shares of stock in Lake, other than treasury shares; Lake is the license of Station KBMX(FM), Eldon, Missouri, the permittee of unbuilt Station KFXE(AM), Cuba, Missouri, and an applicant for a new FM station in Bourbon, Missouri. Rice is also a member of the Board of Directors and President and Treasurer of all three corporate licensees. The CMI and CBI Boards consist of three persons. The Lake Board consisted of two persons until March 13, 1997, when the second Board member resigned from his position, leaving Rice as the only Board member. I.D., .¶¶ 4-9; Licensees Exh. 1; Order, 97M-49, released April 4, 1997.

5. In November 1990, Rice was arrested in St. Charles County, Missouri for criminal conduct involving sexual acts with a teenager. He was formally charged in an Information issued April 1, 1991, and the Information was subsequently amended on January 6, 1993 and July 5, 1994. In the Second Amended Information, Rice was charged with eight counts of deviate sexual assault of individuals who were between fourteen and sixteen years of age, and four counts of sodomy of individuals who were under fourteen years of age. The alleged activities took place between December 1985 and October 1990. On August 11, 1994, Rice was convicted of four counts of sodomy, six counts of deviate sexual assault in the first degree, and two counts of deviate sexual assault in the second degree, all of which are

felonies. The misconduct for which Rice was convicted involved five children. Rice was sentenced to a total to eighty-four years in prison, but, because the sentences were to run concurrently, his maximum imprisonment was to be eight years. He was incarcerated on September 30, 1994. I.D., ¶¶ 10-11, 13-14; Bureau Exh. 1, Attachments 1-3.

6. In an effort to mitigate the impact of Rice's criminal convictions, the Licensees introduced other evidence, as follows. No other principal of the Licensees, nor any of the Licensees' stations, were involved in Rice's misconduct. I.D., ¶22; Licensees Exh. 1. With the exception of minor forfeitures involving a logging violation and an improperly prepared quarterly issues/programs list involving CMI's WBOW(AM) and WZZQ(FM), the Licensees have no prior record of Commission rule violations. I.D., ¶16; Licensees Exh. 1. In addition, four individuals who knew Rice submitted statements attesting to Rice's character and reputation in the broadcast industry. None of the statements indicated specific familiarity with Rice's felony convictions. I.D., ¶¶ 18-21; Licensees Exh. 5. On April 3, 1991, two days after Rice was formally charged in the criminal case, he was voluntarily hospitalized at the Barnes Hospital, St. Louis, Missouri, for in-patient psychiatric treatment, where he remained for approximately six month. In view of the criminal charges, the respective Boards of Directors of the Licensees adopted resolutions in 1991 providing that Rice would have "no managerial, policy, or consultative role in the affairs" of the stations. I.D., ¶29; Licensees Exh. 1.

7. In the I.D., the ALJ reviewed the Commission's policy on character qualifications in broadcast licensing, as set forth in Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179 (1986), recon. denied, 1 FCC Rcd 421 (1986), appeal dismissed sub nom. NABB v. FCC, No. 86-1179 (D.C. Cir. June 11, 1987) ("1986 Character Policy Statement"), modified, 5 FCC Rcd

3252 (1990) (subsequent history omitted) ("1990 Character Policy Statement"), and concluded that all but one of the factors the Commission deems relevant in determining the weight to be accorded Rice's felony convictions militate against the Licensees. The ALJ found that Rice's misconduct was extremely serious, intentional, repeated, and took place with the time frame the Commission deems relevant to character inquiries. Moreover, the ALJ found that the Licensees' attempt to isolate Rice from any role in stations affairs was not successful because Rice engaged in management-level activities after his release from the hospital in October 1991. The I.D. also concluded that the statements of Rice's character witnesses were not entitled to great weight because they did not address the impact of his criminal convictions on his reputation. Although the Licensees had a good record of compliance with the Commission's rules, the ALJ found that this factor alone did not outweigh the other factors he considered. In addition, the ALJ found that, whereas Rice's criminal activities did not appear to affect the operation of the Licensees' broadcast stations, nevertheless, there was a nexus between Rice's criminal behavior and the Licensees' truthfulness because the record established, under the misrepresentation issue, that the Licensees misrepresented facts to the Commission regarding the extent of Rice's role in managing the stations during the time the criminal proceedings were pending. In the ALJ's view, the Licensees' deception was a direct result of Rice's criminal activities because there would have been no need to submit false reports to the Commission had the misconduct not occurred. The ALJ concluded that the Licensees lacked the paramount character traits of truthfulness and reliability, and, in consequence, were not qualified to retain their authorizations.

8. In their exceptions, the Licensees argue that the Commission's character policy is arbitrary and capricious as applied in this case. Specifically, the Licensees maintain that

the Commission's policy of examining the impact of any felony conviction on an applicant's qualifications is unlawful here because there is no connection between Rice's sexual misconduct and the operation of the broadcast stations, or any relationship between the misconduct and the Licensees' propensity to be truthful and comply with the Commission's rules. In this regard, the Licensees contend that the 1986 Character Policy Statement improperly attributes wrongdoing by a controlling stockholder to the corporate licensee, contrary to precedent requiring that a licensee's qualifications be determined on the basis of its record, not misconduct in its principal's private life. Also, the Licensees challenge the ALJ's conclusion linking Rice's criminal behavior to misrepresentation because the Commission's character policy contemplates that any such connection be related to the nature of the misconduct itself. Even if the Commission's character policy is lawfully applied here, the Licensees argue that the ALJ erroneously evaluated the mitigation evidence, and should have found that the non-seriousness of the crimes, the absence of involvement in Rice's misconduct by other corporate principals, the Licensees' record of FCC compliance, Rice's rehabilitation and his reputation in the broadcast community, and the Licensees' remedial efforts sufficed to overcome the impact of Rice's criminal misconduct.

Discussion

9. The purpose of the Commission's character inquiry is to determine whether the public interest would be served by grant of continued operations of the Licensees before us. See 47 U.S.C. §§308(b), 309(a); 1986 Character Policy Statement, 102 FCC 2d at 1180. In the 1986 Character Policy Statement, we expressed our concern with non-FCC "misconduct which demonstrates the proclivity of an applicant or licensee to deal truthfully with the Commission and to comply with our rules and policies." Id.

at 1190-91. In determining whether a licensee possess the character traits of truthfulness and reliability that we consider relevant to is ability to operate a broadcast station in accordance with our rules and policies, we indicated that specific consideration would be given to adjudicated fraud, criminal misconduct involving false statements or dishonesty, and broadcast-related antitrust violations. Id. at 1195. We also stated that "there maybe circumstances in which an applicant has engaged in nonbroadcast misconduct so egregious as to chock the conscience and evoke almost universal disapprobation. . . . Such misconduct might, of its own nature, constitute prima facie evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee . . . ." Id. at 1205 n.60.

10. In the 1990 Character Policy Statement, 5 FCC Rcd at 3252, we significantly expanded our earlier policy regarding the range of non-FCC misconduct we would consider by stating that a licensee's propensity to comply with the law generally is relevant to the Commission's public interest analysis and that evidence of any felony conviction, not just those that involve fraud or untruthfulness, is pertinent to our evaluation of a licensee's character. We stated that a licensee's willingness to commit felonies, which are serious crimes, bears on our confidence that it will conform to our rules and policies. We also recognized that not all convictions for serious crimes are equally probative. Thus, in weighing the impact of a felony conviction on a licensee's requisite propensity to obey the law, we said we would consider traditional mitigating factors, including the willfulness, frequency, currentness, and seriousness of the misconduct, the participation of managers or owners, the licensee's remedial efforts, the overall record of compliance with the FCC rules and policies, and evidence of rehabilitation. Id

11. We do not agree with the Licensees that our character policies are arbitrary and capricious as applied in this case. As explained above, we now consider all felony convictions to be relevant to our determination of whether grant or an application will serve the public interest under 47 U.S.C. § 309(a) because any felony conviction reflects on an applicant's propensity to obey the law generally, a trait which is predictive of its reliability as a licensee and willingness to adhere to our rules and policies. 1990 Character Policy Statement, 5 FCC Rcd at 3252. In addition, even before we broadened the scope of our policy to include all serious crimes, we made plain our view that egregious misconduct would, by its very nature, be prima facie evidence that an applicant lacked the requisite character traits of reliability or truthfulness. 1986 Character Policy Statement, 102 FCC 2d at 1205 n. 60. Thus, contrary to the Licensees' contention, where it is determined that the misconduct in question involves either a felony conviction or egregious wrongdoing, the Commission may lawfully apply it character policies and find a lack of character qualifications without specifically finding a connection between the non-FCC criminal misconduct and the applicant's broadcast activities, and where the criminal behavior is egregious, as it is here, it is also not necessary to find a specific relationship to the applicant's truthfulness. See South Carolina Radio Fellowship, 6 FCC Rcd 4823 (1991) (controlling principal's drug conviction "is itself sufficient basis" for license revocation); Williamsburg County Broadcasting Corp., 5 FCC Rcd 3034, 3035 & n. 4 (1990) (same case) (where criminal misconduct is egregious, we need not find a nexus between behavior and proclivity to be truthful or comply with rules); accord, Richard Richards. 10 FCC Rcd 3950, 3955 (Rev. Bd. 1995). We continue to believe these policies are appropriate and are appropriate specifically as applied in this case. The violations here are extremely serious and do, we believe, give us reason to be concerned about the propensity of the Licensees to comply

with the Communications Act and FCC rules and policies, and to be truthful in their dealings with us.

12. We also disagree with the Licensees that the arbitrariness of the Commission's policy is demonstrated by its inconsistent holdings in other cases involving sexual misconduct. In Hara broadcasting, Inc., 8 FCC Rcd 3177 (Rev. Bd. 1993), cited by the Licensees, the Review Board did not add an issue to explore a felony conviction for sexual misconduct where the arrest and conviction preceded the Commission's expansion of its character policy to cover all felonies and there was no showing whatever with respect to any of the factors the Commission deems relevant in examining an applicant's past behavior. Significantly, as well, Hara did not involve the repeated and long-term sexual abuse of children at issue here. The Licensees also cite The Kravis Co., 11 FCC Rcd 4740 (1996), where the Commission renewed the station licenses without discussion of any character questions. The ALJ in the instant case took official notice (I.D., ¶157 & n. 21) of a 1991 letter from counsel in Kravis advising the Commission that its principal had been charged with sex crimes, but that no conviction or judgment of guilt had been entered against him because he was placed on probation for four years pursuant to the state's deferred judgment procedure. According to the letter, the charges would be expunged upon successful completion of the probation. The Licensees have made no showing that this did not occur or that there was any adjudication or conviction for the Commission to consider.

13. The Licensees also erroneously contend that our policies are arbitrarily applied here because they result in "automatically" attributing Rice's misconduct to them, contrary to The Petroleum v. Nasby Corp., 11 FCC Rcd 3494 (1996), and Wilkett v. ICC, 710 F.2d 861 (D.C. Cir. 1983). The distinction the Licensees seek to draw between the individual and themselves is illusory, however, because Rice

is the sole owner of the Licensees as well as an officer and director of all three corporations, and has never given up these roles. By contrast, in Nasby, the wrongdoer, a minority stockholder, divested his ownership and resigned his corporate positions. Moreover, to make certain that the connection was completely severed, the Commission there remanded the proceeding for a specific determination of whether he could potentially influence the licensee's affairs if the license were renewed.[1] See also Faulkner Radio, Inc., 88 F.C.C. 2d 612, 618 (1981) (renewal conditioned on total exclusion of wrongdoer from station operations). Wilkett involved reversal of an ICC denial of a trucking company's application for expanded authority where the applicant's owner had engaged in criminal activity, including conspiracy to distribute a controlled substance. The court found that there was no record of company misdeeds and that the ICC had disregarded its own standards in past cases for evaluating carrier fitness. In this case, however, as described below, we have carefully weighed each of the factors traditionally considered in evaluating an applicant's

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[1] As the Review Board stated in the same proceeding:

> Were Nasby an individual applicant owned and controlled exclusively by [the wrongdoer], there would be little doubt that this criminal activities catalogued in the record before us would require the denial of its applications.

10 FCC Rcd 6029, 6031 (Rev. Bd. 1995). See also 1986 Character Policy Statement, 102 FCC 2d at 1218 (Commission will treat wrongdoing by corporate managers who are controlling stockholders as though they were sole proprietors or partners). Our policy is not arbitrary, but is intended to treat applicants consistently with respect to character qualifications without regard to the legal form in which they do business. Id. at 1217.

character in order to assess the proper impact of Rice's criminality. Furthermore, we have previously stated that we do not view Wilkett as meaning that a conviction for drug trafficking is irrelevant to a broadcaster's qualifications, particularly since this crime falls into the category of egregious misconduct. See Williamsburg County Broadcasting Corp., 5 FCC Rcd at 3035; see also Commission Clarifies Policies Regarding Licensee Participation in Drug Trafficking (Public Notice), 4 FCC Rcd 7533 (1989) (Commission regards drug trafficking as a matter of the gravest concern and notes that that the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 853a, permits judicial denial of federal benefits to persons convicted of drug offenses). Although each case must be decided on its own facts, it is well established that, where appropriate, the misconduct of one individual may result in the disqualification of the applicant. See FCC v. WOKO, 329 U.S. 223 (1946); Center for Study and Application of Black Development, 11 FCC Rcd 1144 (1996), aff'd by judgment sub nom. Iowa Acorn Broadcasting Corp. v. FCC, No. 96-1066 (D.C. Cir. October 22, 1997).

14. Furthermore, we disagree with the Licensees that the evidence of mitigation in this case overcomes the impact of the felonious criminal activity disclosed in the record. As the ALJ concluded, all but one of the factors we traditionally consider weigh against the Licensees. First and foremost, Rice's misconduct was extremely serous, involving numerous acts of sexual abuse and sexual assault on children ranging from under fourteen to sixteen years of age. Specifically, Rice was convicted of twelve felonies involving the abuse of five children over a five year period. By any standard, these were heinous crimes characterized by moral turpitude. Indeed, we believe they may fairly be described as egregious crimes falling in the category of those that "shock the conscience" and summon almost universal disapproval. As the United States Court of Appeals for the

Second Circuit recently explained in a case involving New York's "Megan's Law":

> The seriousness of the harm that sex offenders' actions cause to society and the perception, supported by some data, that such offenders have a greater probability of recidivism than other offenders have recently combined to prompt the enactment of numerous laws across the country directed specifically toward persons convicted of crimes involving sexual conduct. Studies have shown that sex crimes are widespread . . . and that their impact on both the victim and society as a whole is devastating, see, e.g., [Brief of Amicus Curiae United States] at 5-6 (citing John Briere & Marsha Runtz, Childhood Sexual Abuse: Long-Term Sequelae and Implications for Psychological Assessment, 8 J. Interpersonal violence 312, 324 (Sept. 1993) (noting that molested children are likely to develop severe psychosocial problems) and Alpine Kohn, Shattered Innocence, Psychology Today, Feb. 1987, at 54, 58 (noting that sexually abused boys are more likely than non-abused boys to become sex offenders themselves, and that sexually abused girls are more likely than non-abused girls to have children who are abused)).

Doe v. Pataki, 120 F.3d 1263, 1266 (2nd Cir. 1997).

15. We reject completely the Licensees' claim that the seriousness of the crimes is somehow lessened by the fact that Rice was not sentenced to the maximum term; there is no evidence that the sentencing judge agreed with this

assessment in ordering Rice to serve concurrent sentences or that an eight year sentence is itself an insignificant prison term. In addition to their seriousness, the crimes were willful, repeated over an extended period of time, as recent as five years prior to designation for hearing,[2] and committed by the individual who continues to be the sole owner, president, treasurer, and a member of the Boards of the Licensees. Furthermore, as will be discussed in Detail under the misrepresentation issue, infra, the Licensees did not remedy the situation, as they claimed, by separating Rice from participation in station affairs after the charges were brought against him. In fact, as indicated, Rice has never relinquished any portion of his ownership control or resigned, and he has not been removed from his officer and director positions with the Licensees. Moreover, he was active in personnel and programming matters and performed consultative work for the stations following his hospitalization. The Licensees' evidence of rehabilitation is also insufficient. Three of the character statements submitted on Rice's behalf make no mention of his felony convictions, and the fourth indicates unfamiliarity with the criminal proceeding. The statements address only his competence as a broadcaster. Although the Licensees point out that Rice did not commit further criminal acts after his arrest in November 1990, this does not in itself prove rehabilitation because he has been hospitalized or in prison for approximately half the time since then.[3] The fact that the

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[2] The crimes were well within the ten year limitation applied by the Commission. See 1986 Character Policy Statement, 102 FCC 2d at 1229. Also, Rice's convictions were one year prior to designation. The Commission generally awaits a local court adjudication before it assesses the impact of the criminality on the licensee's character. See 1990 Character Policy Statement, 5 FCC Rcd at 3252.

[3] In this regard, we reject the Licensees' exception to the ALJ's failure to find that Rice has undergone treatment and to admit evidence that Rice

(Continued...)

Licensees have had a good overall record of FCC rule compliance is not alone sufficient to mitigate the overwhelming negative weight of all the other evidence. For the same reason, we disagree with the Licensees that the ALJ erred in disallowing evidence of the stations' good standing and reputation in the community. See Cosmopolitan Broadcasting Corp., 75 FCC 2d 423, 425 n. 3 (1980) (meritorious programming cannot mitigate serious misconduct); KOED, Inc., 3 FCC Rcd at 2827 (Commission will not consider meritorious programming evidence in cases involving intentional wrongdoing or moral turpitude). Contrary to the Licensees' claim, the 1986 Character Policy Statement does not state that misrepresentation is the only area in which past program performance is not considered as mitigating evidence. Id. at 1211 n. 79.

16. In sum, we conclude that our character policies are validly applied to the Licensees, and that the preponderance of record evidence warrants the conclusion that Rice's convictions involving the repeated sexual abuse of children adversely affect their qualifications to remain Commission licensees. As we also concluded with respect to a broadcaster's recent conviction for drug trafficking, we believe that these felony convictions are "egregious crimes against society" that demonstrate a "callous disregard for the

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(...Continued)

is required by law to participate in a special rehabilitation program in prison before his release. We agree with the ALJ that this evidence does not establish current rehabilitation. The Licensees' reliance on Alessandro Broadcasting Co., 99 FCC 2d 1, 11 n. 13 (Rev. Bd. 1984) (subsequent history omitted) is inapposite. There, unlike this case, the applicant's crime was an isolated event that was remote in time; the applicant was completely rehabilitated under local law, as evidenced, among other things, by the issuance of a certificate of rehabilitation by the state court; his civil liberties were restored; he had character references from people familiar with his crime; and no predictive nexus was found between his crime and his fitness to be a licensee.

welfare of fellow citizens." See Williamsburg County Broadcasting Corp., 5 FCC Rcd at 3035. As such, the record below destroys our confidence that the Licensees "would well serve the public through exercise of the wide and important discretion that this agency entrusts to licensed broadcasters." See South Carolina Radio Fellowship, 6 FCC Rcd at 4823-24. Rice is the sole owner of the Licensees as well as a corporate officer and director, and the Licensees were unable to make any significant showing of mitigation. We affirm the ALJ's conclusion that the convictions constitute an independent basis for disqualification.[4]

III. MISREPRESENTATION ISSUE

Background

17. This issue concerns whether the Licensees' statements that, subsequent to his arrest, Rice was completely excluded from any involvement in the management and operation of the radio stations were misrepresentations. The issue was based on filings by the Licensees, beginning in 1991, relating to the criminal charges and the Licensees' asserted efforts to insulate Rice from station affairs. Specifically, in a "Statement Pursuant to Section 1.65 of the Commission's Rules" filed June 14,

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[4] Because of the egregious nature of Rice's crimes and the absence of significant mitigation, it is unnecessary to consider whether there is other evidence implicating the Licensees' propensity for truthfulness in order to resolve the violations of law issue adversely to them. See South Carolina Radio Fellowship, 6 FCC Rcd at 4824 (conviction for drug trafficking is "itself sufficient" for revocation; however, evidence of misrepresentation to the court and other misconduct reinforces adverse implication of conviction.).

1991, Lake made the following statement, which CBI repeated in another Section 1.65 filing on June 21, 1991:[5]

> Since Mr. Rice's hospitalization on April 3, 1991, he has had absolutely no managerial, policy, or consultative role in the affairs of the [Licensees] in which he has ownership interests and officer positions. . . . In other words, pending a resolution of the referenced criminal charges, Mr. Rice is being completely insulated and excluded from any involvement in the managerial, policy, and day-to-day decisions involving any of the . . . stations and . . . construction permits held by the [Licensees].

I.D., ¶¶ 32-33; Bureau Exh. 1. The June 14, 1991 statement also made reference to the 1990 Character Policy Statement. Id. Similarly, on August 1, 1991, in connection with an extension of construction permit application for its Huntsville, Missouri station, CBI informed the Commission that "Mr. Rice continues to be hospitalized and to have absolutely no managerial, policy, or consultative role in the affairs of [CBI]." On December 3, 1991, CBI repeated that "Rice continues to have no managerial, policy, or consultative role in the affairs of [the Huntsville station]. . . ." I.D., ¶¶ 34-35; Bureau Exh. 1.

18. On May 14, 1992, in order to "update the Commission on the status of Mr. Rice's criminal proceedings," CBI stated:

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[5] Section 1.65, 47 C.F.R. §1.65, requires that applicants report substantial and significant changes in their applications within thirty days.

> There has been no change in Mr. Rice's status with [CBI] or in the status of the proceedings against him. . . . Mr. Rice is no longer hospitalized, but he continues to be treated by his physician as an outpatient, and he continues to have no managerial or policy role in the affairs of the [Licensees] in which he has ownership interests and corporate positions. . . .

I.D. ¶36; Bureau Exh. 1.

19. On September 30, 1994, the Licensees informed the Commission of Rice's conviction and sentencing. They also stated:

> [CBI/Lake] has previously reported to the Commission that since Mr. Rice's pre-trial hospitalization on April 3, 1991, he has been excluded from involvement in the customary managerial, policy, and day-to-day decisions and operations of [CBI/Lake's] licensed stations and construction permits. . . . [CBI/Lake] wishes to advise the Commission that the exclusion policy will continue throughout Mr. Rice's period of incarceration.

I.D., ¶38; Bureau Exh. 1. The Licensees additionally stated that they were aware the Commission could commence a revocation proceeding against a licensee because of a principal's felony conviction, but requested ninety days to file a brief arguing that a revocation proceeding should not be instituted as a result of Rice's conviction. Id.

20. After formal charges were brought against Rice in early 1991, the Licensees adopted corporate resolutions providing that Rice should have: no managerial, policy, or

consultative role in the affairs" and daily operations of the Licensees' stations. The corporate resolutions also made Janet Cox, a management employee, Chief Executive Officer, and gave her authority to supervise management and day-to-day operation of the stations. Cox also visited the stations to inform the staffs that she had assumed her new position, that Rice was hospitalized, and that he would not be involved in the operation of the stations. She did not tell the staffs of the corporate resolutions or that Rice was to be excluded from station activities after he left the hospital. Following Rice's release from the hospital in October 1991, Cox authorized him to provide consulting and engineering assistance to the Licensees. To reflect this change, she stated that the Licensees modified their reports to the Commission beginning with the May 14, 1992 report by deleting the statement that Rice would have no "consultative" role. She did not know why a direct statement alerting the Commission to the Rice's changed status was not made. The Licensees did not adopt any corporate resolutions authorizing Rice to do consultative work. I.D., ¶¶ 30-31, 43-44, 46, 54.

21. A number of management-level station employees testified as to whether, apart from his consultative role, Rice was also involved in management or operation of the stations following his release from the hospital. Leon Paul Hanks, an employee of KFMZ(FM), Columbia, Missouri, since August 1985, was made program director of the station in February 1989 and group program director of the CMI/CBI (Terre Haute, Indiana and Columbia, Missouri) stations in late 1991 or early 1992, after Rice was released form the hospital. He was terminated on August 5, 1994. Hanks testified that Rice was involved in programming and personnel decisions at the Terre Haute stations. It was Hanks' belief that he was compelled to follow Rice's suggestions or directions about programming and personnel because Rice was the station

owner and his boss. Hanks stated that his primary responsibility as group program director was to keep the formats of KFMZ and WZZQ consistent with what Rice wanted. As group program director, he reported directly to Rice, and regularly updated him on how things were going at the stations. His first assignment from Rice after becoming group program director was to visit WZZQ to go through its music and refine its format. He and Rice discussed the format of WZZQ, problems involving the station's program director, the playlists of KFMZ and WZZQ, and Rice's complaints that the stations were adding too many new songs. Hanks also sent Rice copies of memos Hanks sent to the program directors. I.D., ¶¶ 81, 86-88, 101.

22. Moreover, Hanks testified that Rice was involved in the hiring and firing of station employees, as follows. Hanks stated that, in May or June 1992, Rice directed him to "get rid of" Janice Pratt, an announcer, because her on-air voice was hurting ratings; that Hanks did not feel it was appropriate to tell Pratt she was being fired for that reason; and that Hanks eventually fired her for persistent tardiness. Rice instructed Hanks to "get rid of" Bob Kinneson, another announcer, because he was bringing down Saturday night ratings, but Hanks did not fire Kinneson because the latter resigned to work for another station. Rice complained to Hanks about KFMZ announcer Sean Madden and said he "needed to be let go," but Madden quit to take another job before Hanks could fire him. In August 1993, Rice told Hanks to "get a replacement" for Jeff Davis, who worked evenings at KFMZ, and Hanks carried out the instruction. Rice approved Hanks' suggestion that Ben Jacobs be moved from KFMZ to WZZQ as program director; but after Jacobs made personnel changes at WZZQ which Rice did not approve of, Rice told Hanks that Jacobs "has got to go"; and Jacobs was fired a week or two later, although Hanks did not do it or know who did. Rice discussed with Hanks hiring Mike Steel, an

announcer Rice had spoken to and was impressed with, to be program director of WZZQ in early 1992; Rice offered the job to Steel and said Cox would take care of the hiring; but, after Steel took the job and changed WZZQ's reporting status in a trade publication from Album Oriented Rock to Top 40, Rice became "furious" and told Hanks he wanted Steel "gone immediately." Rice complained to Hanks that Mark Savage, WZZQ program director from April to November 1992, was not maintaining the station's format and decided to get rid of him; and rice, Cox , and Hanks drove to Terre Haute for the express purpose of firing Savage. After Savage was fired, on the drive back to company headquarters, Rice told Cox he was displeased with the job performance of John Rhea, who was then the general manager of WBOW(AM) and WZZQ(FM), and told Cox that Rhea "has got to go." I.D., ¶¶ 89-91, 94, 96, 98-99, 118-120, 123-24, 129.

23. John Rhea, the general manager of WBOW(AM) and WZZQ(FM) from December 30, 1991 until he was terminated on December 16, 1992, also testified that Rice was involved in programming and personnel decisions at the Terre Haute stations. He further stated that Rice, as the owner of the building in which the stations were located, also directed Rhea to show it to prospective tenants and to keep it clean. Rhea assume that Rice, as the stations' owner, "was the boss." Although he understood from Cox that Rice was an "absentee owner," he said Cox did not tell him Rice was to be excluded from management. With respect to programming, Rhea stated that, six weeks after he became general manager, Rice told him he was unhappy with the musical sound of WBOW, and they had a further discussion about the programming of WBOW a month later. Sometime thereafter, Rice asked Rhea to obtain information about the cost of the Satellite Music Network. Rhea did so and sent the information to Cox, who told Rhea that Rice thought the station could be programmed "cheaper" by

bringing in Rice's own music. Rhea also spoke to Rice about the matter. I.D., ¶¶ 103, 107, 111-112.

24. Rhea testified that Rice was also involved in specific hiring and firing decisions, as follows. He stated Rice told him he did not like Chip Ramsey, WBOW's program director; that Rice "wanted him out of there"; that his firing was delayed only because the station had a contract with Indiana State University for Ramsey to broadcast their baseball games; and that Rhea carried out Cox's instruction to fire Ramsey. Rhea hired Steve Holler as an announcer for WBOW; after Rice heard Holler on his first day on the air he told Rhea, "I want him off the radio"; Rice repeated this direction after Rhea protested; and Rhea fired Holler after Cox told him later that day to "[g]et rid of" Holler. Rice told Rhea he was interested in Mike Steel for the program director position at WZZQ; after Steel was hired, Rice became "livid" and "went ballistic" because Steel changed the station's reporting status to Top 40; Cox told Rhea that Rice wanted Steel "out of there immediately"; and Rhea fired Steel at the instruction of Cox and Rice. Rhea stated that Rice and Cox came to Terre Haute to fire Mark Savage; that Rice said to Rhea, "You and Janet go down there and get him out of here"; and that Rhea and Cox then fired Savage. Rhea stated that Cox and Rice returned to Terre Haute in December 1992 and entered Rhea's office; Rice told Rhea he was being fired because of a "change in direction"; and, after Rice left the room, Cox said Rhea's firing was because Rice was displeased with WBOW's financial figures. I.D., ¶¶ 113, 1115-16, 119-120, 126, 130.

25. Cox testified that Rice was not involved in personnel and programming decisions at the stations, did not fire any announcer, program director, or general manager, and does not make policy or managerial decisions concerning day-to-day operations of the stations. Specifically, Cox said it was Hanks, not Rice, who criticized

Sean Madden's performance and wanted him fired; Rice did not tell her that Ben Jacobs should be fired, but she did not know what Rice may have said to anyone else; she decided to hire Mike Steel and did not get Rice's approval to do so, but did not know what Rice said to others at WZZQ about hiring Steel; she did not tell Rhea to fire Steel after the reporting change in the trade publication, and Steel was not fired but resigned; she believed it was either Rhea or Hanks who wanted Mark Savage fired, she alone went to Terre Haute to terminate Savage, and Rice did not direct her to fire Savage; she directed the firing of Chip Ramsey but not because she knew Rice disliked him, and Rice did not tell her to fire Ramsey; it was Rhea who decided to fire Steve Holler, but she did not know if Rice had instructed Rhea to do so; she decided to fire John Rhea, and Rice accompanied her to Terre Haute only to serve as a witness. I.D., ¶¶ 64-66, 68, 95, 100, 114, 117, 121-22, 127-28, 131.

26. Daniel Leatherman, the general manager of KBMX(FM) from September 1990 to March 1996, testified that KBMX personnel did not report to Rice and that Rice was not involved in hiring or firing station employees. I.D., ¶¶ 69, 74. Kenneth Brown, the general manager of WZZQ(AM) (formerly WBFX(AM)), WZZQ(FM), and WBOW(AM) since April 1993, testified that he has received no written or oral communications from Rice concerning the stations' programming, personnel, or operations. I.D., ¶ 78. Similarly, Richard Hauschild, who has been an employee of KFMZ since October 1988, and the general manager and sales manager since June 1991, testified that he has received no correspondence or telephone calls from Rice regarding any aspect of station policy, management, or daily operations since becoming general manager. I.D., ¶¶ 75-76. Hauschild also testified with regard to the firing of specific station employees. He stated that, six months before Janice Pratt was dismissed, he told Hanks she should either correct her problems or be dismissed; that Rice never told him to

get rid of Pratt and Hanks never told him that rice directed him to fire Pratt; but that he was not privy to all the conversations between Rice and Hanks and did not know whether Rice told Hanks to do something. He stated that Hanks fired Bob Kinneson at Hauschild's suggestion; that Hanks did not tell him Rice wanted Kinneson fired; that, so far as he knew, Rice was not involved in Kinneson's firing, but that he did not know if Rice spoke to Hanks about it. He stated that Rice did not make critical comments to him about Sean Madden's performance, and Hanks did not tell him that Rice did not like Madden. He said that Hanks never told him that Rice wanted Jeff Davis fired, but he did not know whether Rice directed Hanks to fire Davis. I.D., ¶¶ 92-93, 95, 97.

27. In addition to the witness testimony summarized above, there is documentary evidence pertinent to the misrepresentation issue. In 1993, Rice faxed six memoranda to Leatherman. The first five dealt with the purchase of an outdoor sign for KBMX, the construction of a storage building, the purchase of a water cooler, the repair of the newsroom telephone, pressure washing the air conditioner condenser units, and construction of a storage room in the studio building. Leatherman took care of the projects that were the subjects of the memos. He stated that the memos did not relate to broadcast operations, but had to do with Rice's interest as owner and landlord of the KBMX facilities in the station's physical plant. I.D., ¶ 70; Bureau Exh. 8. In the sixth memo, Rice asked Leatherman if KBMX needed some sound effects CDs. Leatherman responded to the memo by talking to Cox, who told him they did not need any more music. Leatherman stated that Rice's memo was a follow-up to Rice being told by Dennis Klautzer, then a 20% shareholder in Lake and its corporate secretary, that KBMX needed more sound effects CDs. I.D., ¶ 71; Bureau Exh. 11.

28. The record also contains four letters written by Rice pertaining to the Licensees. The first, written on "Contemporary Media Broadcasting Group" stationary, and dated April 29, 1993, is addressed to Dale A. Palmer, KZZT Radio, Moberly, Missouri. It states:

> Following up on your telephone calls to Janet Cox, we do not want to sell the bare CP for the Huntsville, MO station. . . . We have had three other bona fide inquiries to purchase the station after it is built. . . . However, with the quickly changing industry, we are always interested in business arrangements that are mutually beneficial to all concerned. Soon, we will begin our plans to construct KTDI and locate our main studio location in Moberly, and a second studio at Macon, MO. If you or your associates would be interested in purchasing the station once it is built and on the air, or have some other arrangements in mind, feel free to contact us. If you have any further thoughts or ideas, please let me or Janet know.

I.D., ¶ 132; Bureau Exh. 1, p.24.

29. Similarly, in another letter dated April 29, 1993 on "Contemporary Media Broadcasting Group" stationary, Rice wrote to Jerrell A. Shepherd, KRES Radio, Moberly, Missouri, as follows:

> Following up on your telephone call to me this week, we do not want to sell the CP for the Huntsville, MO station. Contemporary Broadcasting, Inc. does not have the CP for sale, as was told to you by broker/equipment salesman Chris Kreger. . . . We have had

> three other bona fide inquiries to purchase the station after it is built. . . . However, with the quickly changing industry, we are always interested in business arrangements that are mutually beneficial to all concerned. This is why I suggested you consider a swap of the Lebanon, MO property for the Huntsville, MO property. . . . If you have any further thoughts or ideas, please let me know.

I.D., ¶ 133; Bureau Exh. 1, p. 26.

30. In response to a July 20, 1994 letter from Shepherd to Rice stating "I would like to repeat my offer to buy the Huntsville, Missouri CP," Rice wrote to Shepherd on August 3, 1994 on a "Contemporary Media Broadcasting Group" Fax Line Transmittal Sheet as follows:

> I do not recall you ever making an offer to buy KAAM(FM), Huntsville, MO. You did inquire several times, and I wrote you a letter stating that Contemporary Media does not sell CPs, but we would be open to a discussion with you over trading KAAM . . . for KIRK and KJEL, Lebanon that your company has been attempting to "unload" for years. . . . We fully intend to build KAAM, Huntsville, and operate the station, and at this time none of our stations are for sale.

I.D., ¶ 134; Bureau Exh. 1, p. 30.

31. On November 13, 1995, Rice wrote a letter to Cox as follows:

> It seems that we should install a concrete pad as Cloyd suggested to set the new building on

> top of . . . we need to be sure that Tom Holmes installs grounding material that will tie the building into the tower ground, and the other buildings at the time the building is placed on the pad. The grading should be done so water and snow does not come inside the door. I think that you need to have a stern talk with Ken and Dennis. It is time for them to stay away from KBMX, and let the manager manage. . . . If this does not happen, and you get more reports of incidents, we will have to change the locks and keep them out of the station. . . . One way we can keep morale up is to keep purchasing new equipment such as remote gear, promotional items, vans, etc., so that we give an image of progress, not a dead-end station. . . . You need to make sure that Mary and Selina do almost all of the bookkeeping and office work, so that you can be free to do what you do best, managing the corporation.

I.D., ¶135; Bureau Exh. 9. Cox testified that she did not regard Rice's letter as a direction to her to do the things mentioned, but thought of it as a letter written by someone in prison "whose whole life is the radio . . . and . . . with nothing to do but idle time." Tr. 311, 313-314.

32. The ALJ concluded that the Licensees both misrepresented facts and lacked candor in their reports to the Commission. First, the ALJ found that the Licensees never directly disclosed Rice's consultative activities, but, in fact, represented in their May 14, 1992 pleading that "[t]here has been no change in Mr. Rice's status." In this regard, the ALJ rejected as lacking in candor Cox's testimony that the deletion of the word "consultative" from this and subsequent pleadings was intended to inform the Commission of Rice's

new role. In addition, the ALJ found that Rice was involved in at least some of the programming matters and personnel decisions of the Licensees, that he engaged in determinations as to whether or not to sell or trade a station or construction permit, and that he directed the group program director and two of the general managers of the Licensees' stations to perform certain tasks. The Licensees did not inform the Commission of these activities, the ALJ found, but misrepresented in their September 30, 1994 letter that Rice had been "excluded from involvement" in the management and operation of the stations and construction permits since April 1991. The ALJ specifically found that Rice was involved in programming matters at WFMZ, WZZQ, and KBMX(FM), directed hanks and Rhea in personnel decisions involving the firing of certain employees at their stations, and assigned projects to Leatherman at his station. In reaching these conclusions, the ALJ credited the testimony of Hanks and Rhea over that of Cox, Hauschild, Brown, and Leatherman. The ALJ rejected the Licensees' claim that Hanks and Rhea were "disgruntled" employees out to "get" them, and that their testimony was therefore not credible. The ALJ further found that the documentary evidence supported the testimony of Hanks and Rhea. In addition, the ALJ found that Cox had actual knowledge of Rice's consultative activities as well as his involvement in at least some programming and personnel matters and management-level activities. Moreover, the ALJ stated, Rice himself knew of his participation in the Licensees' affairs, but made no attempt to disclose it, even though he was the stations' sole owner. The ALJ concluded that the Licensees were motivated to deceive the Commission because they wanted to forestall a Commission inquiry into the criminal allegations against Rice and their impact on the Licensees' character qualifications. Had the Licensees disclosed Rice's specific consultative and management activities, the ALJ held, the Commission would have known that he was not "completely insulated and excluded," or that he had no role

in station affairs, as the Licensees had reported on numerous occasions.

33. In their exceptions, the Licensees deny that they inadequately reported Rice's activities to the Commission or that their reports contained false information. with respect to Rice's consultative work, the Licensees argue that their Section 1.65 reports were made in good faith and that Rice's activities were not so significant as to render the reports untruthful since there was no meaningful change in Rice's status. The Licensees also except to the conclusion that Rice was involved in some programming, personnel, and management-level activities after April 1991 and that the Licensees were aware of such involvement. They maintain that Rice did not partake in normal management functions after his release from the hospital, such as station budget and sales activities. Although Rice may have made unsolicited comments to Cox, Hanks and Rhea, the Licensees state, Cox made management decisions independent of what rice may have said. In this regard, the Licensees state there is no evidence that Hanks or Rhea communicated their purported conversations with Rice to Cox. The Licensees also contend that the ALJ improperly gave more weight to the testimony of Hanks and Rhea than to that of the other witnesses, even though both were disgruntled former employees and there was no reason to discredit the others. Specifically, the Licensees state that Hanks filed a discrimination suit against CMI and was heard by Hauschild to say he wanted to "get" the Licensees, and Rhea admitted to some animosity toward both Rice and Cox because of his termination. The Licensees also dispute the ALJ's reliance on corroborating evidence such as the fax messages Rice sent to Leatherman, and argue that these memoranda mainly reflect Rice's role as landlord. Likewise, the Licensees state that Rice's actions, as a shareholder, in rejecting preliminary inquiries about sale of a construction permit do not rise to the level of day-to-day policy or management of the stations. The Licensees also

contend that there is no evidence that Rice's alleged comments to Hanks and Rhea about personnel matters actually dictated the decisions that were made. Finally, the Licensees submit that there is no evidence of any intent to deceive the Commission because the Licensees modified their Section 1.65 reports to make them more accurate, and they had no knowledge of Rice's alleged directives to station employees.

Discussion

34. After careful review of the record, we conclude that the Licensees misrepresented and lacked candor in reporting to the Commission that, subsequent to his arrest, Rice was completely excluded from any further involvement in the management and operation of the Licensees' radio stations. The record reflects that, in their communications to the Commission, the Licensees did not merely fail to sate the full facts; instead, their representations were affirmatively misleading. We agree with the ALJ's detailed assessment of the hearing testimony, which is supported by his evaluation of witness credibility based upon his demeanor observations, and by corroborating documentary evidence. The preponderance of record evidence clearly supports a conclusion that the Licensees were not truthful. The duty of candor requires applicants to be fully forthcoming as to all facts and information that may be decisionally significant to their applications. See Swan Creek Communications v. FCC, 39 F.3d 1217, 1222 (D.C. Cir. 1994); RKO General, Inc. v. FCC, 670 F.2d 215, 229 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 and 457 U.S. 1119 (1982). Broadcasters are held to "high standards of punctilio" and must be "scrupulous in providing complete and meaningful information" to the Commission. See Lorain Journal Co. v. FCC, 351 F.2d 824, 830 (D.C. Cir. 1965). The requirement for absolute truth and candor from those appearing before the Commission is bedrock because the Commission must rely

heavily on the completeness and accuracy of the submissions made to it by applicants who, in turn, have an obligation to provide the Commission with the facts needed to carry out its statutory mandate. Intentional deceit with regard to matters of decisional significance may be disqualifying. See Swan Creek Communications v. FCC, 39 F.3d at 1222; RKO General, Inc. v. FCC, 670 F.2d at 232; Sea Island Broadcasting Corp. v. FCC, 627 F.2d 240, 243 (D.C. Cir.), cert. denied, 449 U.S. 834 (1980).

35. First, with regard to Rice's consultative activities after his release from the hospital, totally apart from his involvement in numerous programming and personnel matters at the stations discussed below, the Licensees were not fully forthcoming in disclosing Rice's consultative role to the Commission. Cox's testimonial claim that the Licensees informed the Commission of Rice's new role by removing the word "consultative" from their May 14, 1992 report is belied by the Licensees' contrary assertion in the same report that "there has been no change in Mr. Rice's status." Despite this obviously misleading characterization, the Licensees did not attempt to further clarify the matter in any future report to the Commission, or modify its corporate resolutions to formally authorize Rice's admitted consultative role. We agree with the ALJ that Cox's testimony that the Licensees were trying to be "as truthful as possible" (tr. 292) in this regard was itself lacking in candor since they never directly informed the Commission of Rice's consultative activities in any of their reports. We also reject the Licensees' exception that their May 1992 report was truthful because 47 C.F.R. §1.65 requires that only significant changes be disclosed. In view of the Licensees' previous reports that Rice would have absolutely no role or involvement in the affairs of the stations, we do not agree that a change resulting in Rice being involved in any manner in the operations of the stations could be considered so insignificant as not to reflect on the continuing accuracy and

completeness of the information furnished by the Licensees. Finally, in this regard, although the Licensees urge that Rice's consultative work at the stations was recommended by his psychiatrist for his rehabilitation, even if so, this fact has no bearing whatsoever on the impact of the Licensees' failure to be candid in disclosing these activities.

36. Turning to Rice's involvement in programming matters, there is testimony from two former management officials who were in knowledgeable positions detailing Rice's activities. Both believed that Rice, as the stations' sole owner, was their boss. Hanks, the group program director of the CMI/CBI stations from late 1991 or early 1992 to August 1994 reported directly to Rice about the stations' programming, visited WZZQ and reviewed its music at Rice's request, regularly discussed with Rice specific programming problems at WZZQ and WFMZ, as well as Rice's complaints about the stations' formats and song lists, and sent Rice memos that Hanks addressed to the stations' program directors. In addition, Rhea, the general manager of WZZQ and WBOW from December 1991 to December 1992, discussed WBOW's programming with Rice, and complied with Rice's specific request that he obtain information about the cost of the Satellite Music Network. Although Cox denied that Rice was involved in programming matters after 1991, and Brown and Hauschild said they had no communications from Rice regarding programming at their stations, they did not testify with respect to the specific instances recalled by Hanks and Rhea, and there is no evidence to contradict the latters' accounts. Indeed, Brown's tenure as general manager of the CMI stations post-dated the particular incidents described above. Moreover, there is also undisputed documentary evidence of Rice's involvement in programming at Lake's Eldon, Missouri station, KBMX(FM), in the form of a fax letter he sent to Leatherman, the station's general manager, asking to be told if the station needed more sound effects CDs. Rice

acted on the basis of information given him by Klautzer, a Lake shareholder and corporate officer, that such CDs were needed, and Leatherman complied with Rice's request by responding to Cox. Clearly, in this regard, if Rice were completely excluded form involvement in day-to-day station affairs, as the Licensees represented, there would have been no reason for a Lake corporate principal to inform him of a problem affecting daily operations of one of the stations or for the station's general manager to follow up on Rice's instructions. We conclude that the record amply supports the ALJ's finding that Rice was involved in programming activities at the Licensees' radio stations.

37. Hanks and Rhea also testified regarding Rice's involvement in numerous decisions to hire and fire station personnel. Specifically, Rice instructed Hanks to fire Pratt, Kinneson, Madden, and Davis; told Hanks that Jacobs, Steel, and Savage should be fired; and Hanks heard Rice tell Cox that Rhea should be fired, and Rhea was told by Cox that Rice wanted Steel fired. Rhea also testified that he was fired by Rice and Cox. Rice also approved Hanks' suggestion to move Jacobs to WZZQ as program director, and Hanks and Rhea both stated that Rice was involved in the hiring of Steel. Although Cox and Hauschild disputed the accounts given by Hanks and Rhea of these personnel actions and stated that Rice did not tell them he wanted the individuals in question hired or fired, both admitted that they were not privy to conversations Rice may have had with Hanks and Rhea about these employees and did not know what instructions he may have given the. Most of the employees about whom Rice gave directions to Hanks and Rhea in fact were let go. That Cox or Hauschild may have independently ordered the dismissal of some of these employees, or that some ultimately were not fired but resigned, does not undermine the significance of the evidence of Rice's involvement in these matters. In other words, Rice's involvement was inconsistent with the

Licensees' representations that he was excluded from the customary management and operation of the stations, regardless of whether other management officials also played a role in these decisions.

38. Insofar as there is a conflict in witness testimony regarding the extent or Rice's involvement in these personnel activities, however, we defer to the credibility findings of the ALJ who observed the witnesses and found Hanks and Rhea to be more believable. An ALJ's credibility finds are "entitled to great weight," Broadcast Assoc. of Colorado, 104 FCC 2d 16, 19 (1986), and his credibility determinations will be upheld unless the findings patently conflict with other record evidence. Milton Broadcasting Co., 34 FCC 2d 1036, 1045 (1972); KQED, Inc., 3 FCC Rcd 2821, 2823 (Rev. Bd. 1988), rev. denied, 5 FCC Rcd 1784 (1990), recon. denied, 6 FCC Rcd 625 (1991), aff'd mem. sub nom. California Public Broadcasting Forum v. FCC, 947 F.2d 505 (D.C. Cir. 1991); see also WHW Enterprises, Inc. v. FCC, 753 F.2d 1132, 1141 (D.C. Cir. 1985) (ALJ's credibility findings may not be upset unless reversal is supported by substantial evidence). In this regard, we disagree with the Licensees that Hanks and Rhea exhibited bias against them and, therefore, should not have been credited. Hanks brought a discrimination suit against the Licensees because he believed his termination was based solely on his health problem, epilepsy. Tr. 364. Hanks adamantly denied Hauschild's assertion that he made an off-the-record comment at a deposition in the suit that he wanted to "get" Rice and the Licensees, and the ALJ, after carefully evaluating Hanks' demeanor, found he was being truthful. I.D., ¶ 84 n. 8. Although the Licensees contend that the ALJ misinterpreted Hanks' demeanor, the law accords deference to the ALJ's witness observations. See Maria M. Ochoa, 8 FCC Rcd 3135 (1993), recon. denied, 9 FCC Rcd 56, recon. dismissed, 10 FCC Rcd 142 (1995), aff'd by judgment, 98 F.3d 646 (D.C. Cir. 1996) (Table) (affirming ALJ credibility

conclusion that witnesses were not biased or seeking to "get back" at applicant). Similarly, the Licensees argue that Hanks admitted to a tendency to exaggerate, but a careful review of his testimony reveals that he admitted exaggerating only when he said that Rice "never" changed his mind once it was made up, and clarified his testimony to say that Rice "occasionally" changed his mind and that he did not exaggerate in any of his other statements. I.D., at ¶ 102. Rhea admitted to some animosity toward Cox "at the time" he was fired because he viewed his termination as a career setback, but, as the ALJ found, there was no evidence that he continued to harbor such feelings when he testified three and a half years later. With regard to his alleged animosity to Rice, Rhea stated only that he was told he was fired because WBOW's numbers were not what they should be, that he felt the negative publicity surrounding Rice's situation contributed to the numbers going down, and that, therefore, "if [he] wanted to blame someone," he would blame Rice "a little bit." Tr. 521-22. We agree with the ALJ that Rhea's hypothetical response does not establish bias. I.D. at ¶ 188. Finally, in weighing witness credibility, we also agree with the ALJ that Cox, Hauschild, and Brown have "more to lose" from an adverse resolution of this proceeding because they are currently employed by the Licensees, whereas Hanks, Rhea, and Leatherman have no pecuniary interest in the outcome. Id. at ¶¶ 183-85. See The Prattville Broadcasting Co., 5 F.C.C. 2d 601, 602 (1966) (interest of witnesses in proceeding is relevant to credibility).[6]

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[6] Although the Licensees point to Cox's testimony that she has other sources of income and could maintain her current lifestyle, the ALJ found that she receives a salary of approximately $60,000 from the Licensees, has numerous perquisites including cost of living adjustments, bonuses, health insurance, and use of a car, that both her son and daughter are employed in managerial positions at the stations, and that (Continued...)

39. The testimony of Hanks and Rhea that Rice's involvement in the operation of the stations extended to more than just consultative work is also supported by contemporaneous documentary evidence in the record. See American International Development, Inc., 86 FCC 2d 808, 815 (1981) (existence of corroborative evidence is factor to be considered in weighing the truth of witness testimony); TeleSTAR, Inc., 2 FCC Rcd 5, 13 (Rev. Bd. 1987) (subsequent history omitted) (credibility involves the manner in which testimony "hangs together with other evidence"). Specifically, Rice sent six fax messages to Leatherman in 1993 directing him to take certain actions at KBMX. Although the Licensees contend that all but one of these memoranda related to Rice's role as landlord, the pattern is the same as that with respect to the other activities of Rice giving instructions to management officials which are then carried out. Similarly, Rice instructed Cox to take certain actions regarding personnel and other station matters in a 1995 letter. And perhaps most corroborative of Rice's involvement in station management are the three letters he wrote in 1993 and 1994 to officials of two radio stations in Moberly, Missouri, rejecting offers to purchase one of the Licensees' construction permits, inviting an offer to purchase a station once it is on the air, and suggesting an exchange of existing stations. In his letter to Dale Palmer of KZZT, Rice stated that he was following up on Palmer's calls to Cox,

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(...Continued)

her husband does business with the Licensees. I.D. ¶ 184. Thus, the ALJ reasonably concluded that she and her family would be seriously impacted by an adverse result. The Licensees also state that Leatherman is no longer employed by the, but the ALJ made this finding, as noted in the text. In any event, as to Rice's involvement in specific personnel matters, Leatherman's testimony does not directly conflict with that of Hanks and Rhea because they testified to Rice's activities at the Terre Haute and Columbia stations, whereas he was employed at the Eldon station.

which clearly implies that Cox apprised Rice of Palmer's purchase offer even though the Licensees had informed the Commission that Rice was "being completely insulated and excluded" from management activities. In this regard, we reject completely the Licensees' argument that the letters are unimportant because they do not relate to day-to-day station management; as the ALJ concluded, the decision as to whether or not to sell a broadcast property "is the ultimate management-level decision." I.D., ¶ 178.

40. Finally, we reject the Licensees' contention that there is no evidence of any intent to deceive the Commission because they lacked knowledge of Rice's involvement in station affairs and updated their Section 1.65 reports to insure their accuracy. In fact, the Licensees' reports, in addition to failing specifically to inform the Commission of Rice's consultative role, also did not tell the Commission of Rice's other activities of which the Licensees were aware. Specifically, with regard to Cox's knowledge of Rice's activities, the record shows that: Rice followed up on Palmer's phone calls to Cox when he responded to Palmer's interest in purchasing one of the construction permits; Rice informed Cox that he wanted Rhea fired, and Cox told Rhea that he was being fired because of Rice's displeasure over the station's financial figures; Cox told Rhea that Rice wanted Steel fired after Steel changed WZZQ's reporting status in a trade publication; after Rice asked Rhea for information about the cost of the Satellite Music Network, Cox told Rhea that Rice thought WBOW could be programmed for less money by bringing in Rice's own music; and Leatherman responded to Cox after Rice asked him about the need for sound effect CDs. Other station officials also knew of Rice's activities. Thus, Leatherman knew of the six faxes Rice sent him pertaining to various assignments at KBMX; Klautzer communicated to Rice the need for sound effects CDs at one of the stations; and Hanks and Rhea knew of Rice's specific involvement in

programming and personnel matters at their stations. In short, although numerous high-level management officials were aware of Rice's activities, the Licensees never modified their reports to the Commission that Rice was "completely insulated and excluded" from involvement in management and operation of the stations and had "no managerial or policy role in the affairs" of the Licensees. We conclude that the Licensees, who were well aware of the Commission's character policies, intended to mislead the Commission in these reports because they wished either to avoid Commission inquiry into Rice's criminal activities or to minimize the impact of those activities on the Licensees' qualifications by representing that he was no longer involved in the affairs of the stations. See Leflore Broadcasting Co., Inc. v. FCC, 636 F.2d 454, 462 (D.C. Cir. 1980) (deceptive intent may be found where there is a false statement together with knowledge of its falsity); Black Television Workshop, 8 FCC Rcd 4192, 4198 n. 41 (1993), recon. denied, 8 FCC Rcd 8719 (1993), rev. denied, 9 FCC Rcd 4477 (1994), aff'd sub nom. Woodfork v. FCC, 70 F.3d 639 (D.C. Cir. 1995) (Table) ("Intent is a factual question that can be inferred if other evidence shows that a motive or logical desire to deceive exists, as is the case here.")

IV. SANCTION

41. We conclude that the appropriate sanction for the misconduct displayed on this record is revocation of the Licensees' existing authorizations and denial of its new station application. In agreement with the ALJ, we find that Rice's felony convictions and the Licensees' misrepresentation and lack of condor with respect to Rice's role at the radio stations subsequent to his arrest constitute separate and independent grounds for disqualification of the Licensees. The Commission has removed broadcast authorizations because of serious misconduct, including violations of law, see South Carolina Radio Fellowship, and

misrepresentation or lack of candor, see Leflore Broadcasting Co., Inc. v. FCC, 636 F.2d at 461 ("Ever since the Supreme Court's decision in WOKO (footnote omitted), it has been clear that the Commission may refuse to renew a license where there has been willful and knowing misrepresentation or lack of candor in dealing with the Commission.") Moreover, the totality of the evidence in this proceeding of Rice'' criminal acts and the Licensees' deceit convinces us that the Licensees lack the requisite character qualifications to deal truthfully with the Commission and to comply with our rules and policies. See 1986 Character Policy Statement, 102 F.C.C. 2d at 1190-91; 1990 Character Policy Statement, 5 FCC Rcd at 3252; Star Stations of Indiana, Inc., 51 F.C.C. 2d 95 (1975), aff'd sub nom. Star Broadcasting, Inc. v. FCC, 527 F.2d 853 (D.C. Cir. 1975), cert. denied, 425 U.S. 992 (1976).

42. The Licensees claim in their exceptions that revocation of their authorizations would violate the Excessive Fines Clause of the Eighth Amendment.[7] Relying on Austin v. United States, 509 U.S. 602 (1993), which held that a civil forfeiture of property can be subject to the Eighth Amendment if it is imposed as a monetary punishment, the Licensees argue that license revocation would be unduly punitive in this case and an improper exercise of the Commission's discretion. We disagree that revocation here is constitutionally or otherwise inappropriate. Unlike a Commission license revocation proceeding, Austin involved an in rem forfeiture action against the mobile home and auto body shop of the petitioner under 21 U.S.C. §§ 881(a)(4) and (a)(7), which statues provide for the forfeiture of property used to facilitate drug-related crimes, 509 U.S. at 604. By contrast, 47 U.S.C. §312(a) provides for revocation of a

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[7] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const., Amend. VIII.

station license or construction permit, inter alia, because of conditions which would warrant denial of a license or permit on an original application, or for willful or repeated violation of any provision of the Communications Act or Commission rule. In other words, the Commission's purpose is not to impose punishment, but it may revoke an authorization where, as here, it finds that the licensee or permittee has not met its statutory obligation to operate its facility in the public interest. See 47 U.S.C. §§307(a), 309(a). A licensed broadcaster is "granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966). Thus, licensees do not own their authorizations but have only the temporary privilege of holding their licenses to operate their stations as public trustees, and a revocation proceeding such as this one does not involve forfeiture or seizure of the physical assets or facilities of the station. See also 47 U.S.C. §§ 301, 304, 309(h).

43. The Commission has broad discretion in its choice of remedies and sanctions. See RKO General, Inc. v. FCC, 670 F.2d at 237; Leflore Broadcasting Co. v. FCC, 636 F.2d at 463; Lorain Journal Co. v. FCC, 351 F.2d at 831. As previously explained, we believe the misconduct in this case was extremely serious, involving egregious criminal acts by the Licensees' sole owner and repeated misrepresentations by the Licensees designed to minimize the effect of Rice's criminal record on their qualifications. Cumulatively, the evidence of misconduct warrants a conclusion that the Licensees lack the requisite character traits of truthfulness and reliability to retain their authorizations. Unlike United Broadcasting Co., 100 F.C.C. 2d 1574, 1584 (1985), cited by the Licensees as support for a lesser sanction where there was significant evidence mitigating the impact of misconduct at two of the licensee's stations, including the institution of

pervasive remedial measures to prevent recurrence, the Licensees produced little evidence to mitigate the impact of Rice's misconduct, their remedial efforts to remove him from day-to-day management and policy activities at the stations were unsuccessful, and their representations in this regard were untruthful. That case also involved the deterrent impact of the Commission's previous denial of license renewal, which situation does not pertain here. See RKO General, Inc., 5 FCC Rcd 642, 644 (1990) (and cases cited therein) (deterrent impact of previous denial may provide basis for conclusion that recurrence of misconduct is unlikely). Moreover, unlike the cited cases, the misconduct here was not isolated or restricted to the operations of any particular station, but involved the criminal actions of the controlling owner of the Licensees and the Licensees' representations to the Commission on behalf of all their stations. We conclude that revocation is appropriate in the circumstances of this case.[8]

V. ORDERING CLAUSES

44. ACCORDINGLY, IT IS ORDERED, That the licenses of Contemporary Media, Inc. for Stations WBOW(AM), WZZQ(AM) (formerly WBFX(AM)), and WZZQ(FM), Terre Haute, Indiana, the authorizations of

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[8] In view of the seriousness of the misconduct and the Licensees' failure to undertake adequate remedial steps, we do not believe forfeiture is the more appropriate sanction. See PCS 2000, L.P., 12 FCC Rcd 1681, 1688-89 (1997) (forfeiture imposed for misrepresentation and lack of candor where applicant took measures expeditiously to remove wrongdoers from all positions of ownership and control). Insofar as the Licensees argue that revocation would adversely affect their station employees, we point out that our order permits the Licensees to keep operating pending the completion of appellate review. See RKO General, Inc., 89 F.C.C. 2d 361, 365 (1982) (Commission considers equity and fairness with respect to station employees in allowing continued operation by disqualified licensee pending appeal).

Contemporary Broadcasting, Inc. for Stations KBMX(FM), Eldon, Missouri, and KAAM-FM, Huntsville, Missouri, and the authorizations of Lake Broadcasting, Inc. for Stations KBMX(FM), Eldon, Missouri, and KFXE(FM), Cuba, Missouri, ARE REVOKED, and the application of Lake Broadcasting, Inc. (File No. BPH-921112MH) for a construction permit for a new FM Station on Channel 244A at Bourbon, Missouri, IS DENIED.

45. IT IS FURTHER ORDERED, That the Licensees ARE AUTHORIZED to continue operation of Stations WBOW(AM), WZZQ(AM), WZZQ(FM), KFMZ(FM), and KBMX(FM) until 12:01 A.M. on the ninety-first day following the release date of this Decision to enable the Licensees to conclude the stations' affairs; PROVIDED, however, that if the Licensees seek reconsideration or judicial review of our Decision, they are authorized to continue to operate Stations WBOW(AM), WZZQ(AM), WZZQ(FM), KFMZ(FM), and KBMX(FM) until 12:01 A.M. on the ninety-first day following the release date of any order on reconsideration or the completion of judicial review, whichever is later. Judicial review is completed when the forum which has jurisdiction to review this proceeding issues its mandate: Provided, however, that in a case when the mandate issues prior to the expiration of the period for seeking Supreme Court review and the permittee seeks Supreme Court review, judicial review will not be completed until the Supreme Court denies the petition for certiorari or issues a ruling on the merits affirming the denial of the applications, whichever occurs later.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	MM Docket No. 95-154
	)	
CONTEMPORARY MEDIA, INC.	)	
	)	
Licensee of Stations WBOW(AM), WBFX(AM), and WZZQ(FM), Terre Haute, Indiana	)	
	)	
Order to Show Cause Why the Licenses for Stations WBOW(AM), WBFX(AM), and WZZQ(FM), Terre Haute, Indiana, Should Not be Revoked	)	
	)	
CONTEMPORARY BROADCASTING, INC.	)	
	)	
Licensee of Station KFMZ(FM), Columbia, Missouri, and Permittee of Station KAAM-FM, Huntsville, Missouri (unbuilt))	)	
	)	
Order to Show Cause Why the Authorizations for Stations KFMZ(FM),	)	

Columbia, Missouri, and KAAM-FM, Huntsville, Missouri, Should Not be Revoked	)	
LAKE BROADCASTING, INC.	)	
Licensee of Station KBMX(FM), Eldon, Missouri, and Permittee of Station KFXE(FM), Cuba, Missouri	)	
Order to Show Cause Why the Authorizations for Stations KBMX(FM), Eldon, Missouri, and KFXE(FM), Cuba, Missouri, Should Not be Revoked	)	
LAKE BROADCASTING, INC.	)	File No. BPH-921112MH
For a Construction Permit for a New FM Station on Channel 244A at Bourbon, Missouri	)	

ORDER

Adopted: April 22, 1999 ; Released: April 28, 1999

By the Commission:

1. This Order denies a Petition for Reconsideration of a Commission Decision that affirmed an Initial Decision revoking the licenses and construction permits held by Contemporary Media, Inc., Contemporary Broadcasting, Inc., and Lake Broadcasting, Inc. (collectively, "Licensees"), and denying the Licensees' application for a new station. The Commission agreed with the ALJ that the Licensees should be disqualified because of violations of law relating to repeated sexual abuse of children by the stations' sole owner and misrepresentations by the Licensees. Contemporary Media, Inc., 13 FCC Rcd 14437 (1998).

2. Michael Rice, who is the Licensees' sole shareholder, the corporate president and treasurer, and director, was convicted in 1994 of twelve felonies, including eight counts of deviate sexual abuse and four counts of sodomy. These crimes involved five children. As a consequence of his criminal acts, Rice is currently incarcerated serving a maximum prison term of eight years.

3. In our Decision, we addressed first the effect of Rice's convictions on the Licensees' basic qualifications. In response to the Licensees' argument that the Commission's governing character policy is arbitrary and capricious as applied in this case, we reviewed the Commission's policy on character qualifications in broadcast licensing, as set forth in Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179 (1986), recon. denied, 1 FCC Rcd 421 (1986), appeal dismissed sub nom. NABB v. FCC, No. 86-1179 (D.C. Cir. June 11, 1987) ("1986 Character Policy Statement"), modified, 5 FCC Rcd 3252 (1990) (subsequent history omitted)("1990 Character Policy Statement"). We concluded that our character policies are validly applied to the Licensees, and that Rice's convictions involving the repeated sexual abuse of children adversely affected their qualifications to remain Commission licensees.

We further found that the Licensees did not make any significant showing of mitigation under this issue. Contemporary Media, Inc., 13 FCC Rcd at 14439, 14441 ¶¶ 4-5, 9. In addition to our findings regarding the impact of Rice's criminal behavior, we concluded that the Licensees misrepresented and lacked candor in repeatedly reporting to the Commission that, subsequent to his arrest, Rice was completely excluded from any involvement in the management and operation of the Licensees' radio stations. We held that Rice's criminal acts and the Licensees' deceit constituted separate and independent grounds for disqualification of the Licensees, and that the Licensees lacked the requisite character qualifications to deal truthfully with the Commission and to comply with our rules and policies. Id. at 14454-59 ¶¶ 34-41.

4. In their Petition for Reconsideration, the Licensees renew their contention that the Commission's 1986 and 1990 Character Policy Statement are arbitrary, both in general and as specifically applied to the Licensees, because there is no nexus between Rice's sexual misconduct and the Licensees' broadcast activities or propensity for truthfulness and reliability. The Licensees also argue that the Commission has not explained how it weighs the mitigation factors it applies in assessing the impact of criminal behavior and that, in any case, the Licensees' showing of mitigation was sufficient to warrant a conclusion that they are qualified. In this regard, the Licensees submit a July 23, 1998 letter from Donald L. Wolff, who is described as "Rice's parole counsel," which states that Rice is scheduled to be released from prison no later than December 29, 1999, and perhaps as early as April 30,1999. The Licensees argue that this information indicates that the Commission overstated the seriousness of Rice's crimes because he will "serve less than six years." Petition at 10.

5. With regard to the misrepresentation finding, the Licensees contend that the Commission mischaracterized the Licensees' statements because they never claimed to remove Rice from all station activities but only management, policy, and day-to-day decisions. Insofar as Rice performed the activities attributed to him in the record, the Licensees aver, this conduct was not decision-making and, accordingly, the Licensees' reports were not inaccurate. Although these "distinctions are subtle" (Petition at 13), the Licensees argue that they are supported by the record. The Licensees submit that the evidence establishes only that Rice "made unsolicited comments" to various station officials (Petition at 17), and engaged in "shmoozing, musings, and intermeddling" (Petition at 19), but not decision-making activities. Finally, the Licensees argue, as they did in their exceptions, that revocation of their authorizations violates the Excessive Fines Clause of the Eighth Amendment, and they cite U.S. v. Bajakajian, 118 S. Ct. 2028 (1998), for the proposition that revocation is a grossly disproportionate penalty.

6. It is well established that the Commission does not grant reconsideration simply for the purpose of debating matters on which it has already deliberated and spoken. See WWIZ, Inc., 37 FCC 685 (1964), aff'd sub nom. Lorain Journal C. v. FCC, 351 F. 2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966). To be successful, a petition for reconsideration must rely on new facts, changed circumstances, or material errors or omissions in the underlying opinion. See Sandab Communications Limited Partnership II, FCC 98-131, released June 24, 1998, ¶ 70; Isis Broadcast Group, 8 FCC Rcd 24 (Rev. Bd. 1992), rev. denied, 8 FCC Rcd 7040 (1993). Here we agree with the Mass Media Bureau's position in its opposition that the Licensees' Petition does not meet this test but largely reiterates arguments that we previously considered and rejected. Illustrative of the Licensees' overall approach is

the fact that the four principal arguments and three sub-categories of arguments listed in its Table of Contents are in almost identical verbatim repetition of the same arguments listed in the Table of Contents of its original exceptions. That is an insufficient basis for reconsideration.

7. On the violations of law issue, with respect to the application of our character policies to the Licensees, we affirmed our view that where, as here, there is a record of felony convictions involving "egregious crimes against society" that demonstrates a "callous disregard for the welfare of fellow citizens," we need not find the specific link or nexus the Licensees demand. We explained that the violations themselves are so serious that we have legitimate reason for concern about the Licensees' propensity to conform to our rules and policies, and to be truthful with us. Contemporary Media, Inc., 13 FCC Rcd at 14442, 14446 ¶¶ 11, 16.

8. In addition, we carefully reviewed the mitigation evidence in the record and concluded, contrary to the Licensees' view, that all but one of the factors we traditionally consider weighed against the Licensees. We found that Rice's crimes were extremely serious, willful, repeated over an extended period of time, recent, and committed by the sole owner of the stations. Furthermore, the Licensees failed to take adequate remedial measures, as they claimed, by removing Rice from involvement in station management after the charges were brought against him and did not establish rehabilitation. The Licensees' good overall record of rule compliance alone did not overcome the cumulative adverse impact of all this other evidence. Id. at 14444-46 ¶¶ 14-15. Thus, we perceive no ambiguity in our policy or its application here because, whatever "weighing" or order of preference we might assign to these individual factors, as urged by the Licensees, the overwhelming

preponderance of record evidence in this case still would warrant a resolution adverse to the Licensees.

9. The only new information submitted by the Licensees with respect to mitigation is the Wolff letter. The letter states that Rice's "conditional release date" is December 29, 1999; that following completion of a 12-month Missouri Sexual Offender Program, he could be released earlier "based on good behavior"; and that Wolff "expect[s]" release will be no later than December 29. As this letter indicates, the actual date of Rice's release from confinement has not yet been determined by prison authorities and is far from certain. But even if his time served ultimately is "less than six years," instead of eight, we do not see how this in itself reduces the seriousness of the nature of Rice's crimes or their negative impact on the Licensees' qualifications. Id. at 14444-46 ¶ 15.[1]

10. With regard to our findings of misrepresentation and lack of candor, we disagree with the Licensees that the "subtle distinctions" they are drawing between evidence of decision-making and other station activities warrant reconsideration. First, these purported distinctions do not undermine our conclusion that the Licensees lacked candor because they never directly informed the Commission in their reports that Rice was involved in consultative activities at the stations, even though their initial reports represented to the Commission that he had "no consultative role in the

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[1] We also disagree with the Licensees that we incorrectly affirmed the ALJ's refusal to credit the four "character statements" submitted on Rice's behalf. These statements do not carry great weight for the intended purpose because they do not discuss Rice's character in light of his criminal activities, but only his business record and ability, and one even disavows familiarity with Rice's criminal prosecution. Id. at 14444-46 ¶ 15; Licensees Exh. 5. Hence the letters afford little or no evidence of Rice's good character or rehabilitation.

affairs" of the stations and a later report claimed that there was "no change in Mr. Rice's status," even after he had taken on such a role. The Licensees did not attempt to clarify this matter in any of their reports, even though their initial reports clearly purported to exclude Rice from more than just decision-making. Id. at 14454-55 ¶ 35.

11. Second, quite apart from the evidence of Rice's consultative activities, we also found extensive testimonial and documentary evidence that Rice was openly involved in the operation of the stations, contrary to the Licensees' representation to the Commission that, from the time Rice was formally charged with criminal behavior, he was "excluded from involvement" in "day-to-day decisions and operations." In spite of the Licensees' overt claim in their initial reports that Rice was being "completely insulated and excluded from any involvement in . . . day-to-day decisions involving any" of the stations, the record disclosed detailed evidence of his involvement in specific programming matters at the stations as well as numerous decisions to hire and fire station personnel. Id. at 14448-50, 14451 ¶¶ 21-24, 27. Notwithstanding the Licensees' characterization in their Petition, these were undoubtedly decision-making activities. Indeed programming and personnel are two areas traditionally associated with station control. See Bennett Gilbert Gaines, 8 FCC Rcd 1405 (Rev. Bd. 1993), rev. denied, 9 FCC Rcd 533 (1994).[2] Although other management officials may have had an independent role in these decisions, and Rice may have been excluded from other management decisions, as the Licensees' maintain, there is no question that Rice's involvement in the important

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[2] The Licensees did not except to the ALJ's conclusion that Rice did not abandon or relinquish ultimate control over the Licensees because "Rice was never totally isolated and excluded form the management, operations, and affairs of the Licensees' stations." Contemporary Media, Inc., 12 FCC Rcd 14254, 14305 ¶ 197 (ALJ 1997).

station affairs described in the record was inconsistent with the Licensees' report that he was completely excluded from the "customary" management and operation of the stations and had "no managerial or policy role in the affairs" of the Licensees. Rice's activities went well beyond the Licensees' current assertion that he was merely making "unsolicited comments" or "shmoozing."[3] In fact, he gave various instructions to station officials that were carried out, and employees he wanted fired were let go. Contemporary Media, Inc., 13 FCC Rcd at 14455-56, 14457-58 ¶¶ 36-37, 39. Moreover, the Licensees never amended their reports to disclose the extent of Rice's involvement at the stations.

12. We also reject the Licensees' strained contention (Petition at 18-19) that evidence of Rice's involvement in station management in the form of three letters he wrote to officials of two radio stations rejecting offers to purchase one of the Licensees' construction permits, inviting an offer to purchase a station once it is on the air, and suggesting an exchange of existing stations, is insignificant because it shows involvement in ownership, rather than management and operation. We find that this distinction is not persuasive. The only case support cited by the Licensees is the Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393, 395-96 (1995), which discusses the Commission's former ownership integration criterion. That comparative licensing policy, however, has no bearing on the issue here or the factual record of Rice's involvement in significant managerial decisions at the stations. We affirm our original conclusion that the decision to sell a broadcast property is a fundamental management-level activity. Id. at 14457-58

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[3] According to Rosten, The Joys of Yiddish 300 (1986), "shmooz means a friendly, gossipy, prolonged, heart-to-heart talk." This hardly describes Rice's persistent and extensive involvement in important day-to-day decisions and operations at the stations.

¶39. But even if we were to disregard this aspect of Rice's involvement, the other corroborative evidence cited in ¶39 supports our conclusions. Finally, contrary to the Licensees' contention (Petition at 19), it is clear from the record that a member of high-level management officials had personal knowledge of Rice's decision-making activities; yet the Licensees never disclosed these activities by correcting or clarifying the representations made in their report to the Commission. Id. at 14458-59 ¶ 40.

13. Finally, we continue to believe that the revocation ordered in this proceeding does not violate the Eight Amendment. U.S. v. Bajakajian, relied on by the Licensees, which involved a forfeiture of currency for violating a federal statute requiring the reporting of the transportation of more that $10,000 outside the country, appears to have little bearing on the Commission's revocation authority. The court held that a "punitive forfeiture" violates the Excessive Fines Clause if it is "grossly disproportional" to the gravity of the offense. Id. at 2036. Revocation, however, is intended to ensure that stations will be operated in the public interest and does not involve seizure of the Licensees' property. Moreover the Licensees' argument (Petition at 24) that Rice has already been punished for his crimes by the state of Missouri misses the point of the Commission's character inquiry, and their further contention that they did not engage in intentional deceit that would warrant revocation is not supported by the record. We reaffirm that revocation is appropriate in this case.

14. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed July 27, 1998 by Contemporary Media, Inc., Contemporary Broadcasting, Inc., and Lake Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

s/Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX D

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 99-1198

September Term, 2000

Contemporary Media, Inc., et al.,
Appellants

Filed On:
UNITED STATES
COURT OF APPEALS
FOR DISTRICT OF
COLUMBIA CIRCUIT
FILED SEP 14 2000
CLERK

v.

Federal Communications Commission,
Appellee

BEFORE: Silberman, Henderson and Garland, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed July 31, 2000, and of the supplement thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 99-1198 **September Term, 2000**

Contemporary Media, Inc., et al.,
Appellants

v.

Federal Communications Commission
Appellee

Filed On:
UNITED STATES
COURT OF APPEALS
FOR DISTRICT OF
COLUMBIA CIRCUIT
FILED SEP. 14 2000
CLERK

BEFORE Edwards, Chief Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, the supplement thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX F

WAYNE A. STILLINGS, M.D.
KARE & THERAPY, INC.

CERTIFIED IN PSYCHIATRY
AMERICAN BOARD OF PSYCHIATRY
AND NEUROLOGY

1034 SO. BRENTWOOD, SUITE 516
ST. LOUIS, MO 63117
(314) 721-8242

July 29, 1994

The Honorable Jack Edwards

RE: Michael Rice

Your Honor:

IDENTIFYING DATA:

Mr. Michael Rice, is a fifty-three year old single white male who has been under my care from March 28, 1991 through the present. I have seen Mr. Rice for approximately 230 treatment sessions.

INFORMATION SOURCES:

Michael Rice, the patient's parents, Shirley and Mall Rice, the preliminary hearing records from the Circuit Court of St. Charles County, Missouri from March 21, 1991, the

deposition of Timothy Fiorini taken September 9, 1991, the report of Dr. J. Rabun, M.D., written September 27, 1991, Serial MMPI Testing, the Fifteen Items Test, the records of Barnes Hospital, the records of Dr. Ann Duncan, Ph.D., and Dr. W. Hively, Ph.D.

HISTORY:

For a clinical psychiatric history and general psychiatric assessment please refer to my prior reports dated June 17, 1991 and July 22, 1991 addressed to the Honorable Fred Rush (attached).

PSYCHIATRIC DIAGNOSIS:

1. Bipolar Affective Disorder, Mixed 296.6 – in remission
2. Dysthymia 300.40 – in remission
3. Dissociative Disorder NOS 300.15 – in remission
4. Alcohol Abuse 305.00 – in remission

PSYCHIATRIC TREATMENT:

Mr. Rice has undergone extensive inpatient psychiatric treatment (six months) and extensive outpatient psychiatric treatment that has consisted of multiple psychotherapeutic approaches and the use of psychotropic medication. He has received covert desensitization, which is a technique to normalize deviant thoughts and behavior patterns, especially with regard to the issue of sexual deviancy, cognitive behavior therapy, relaxation training, alcohol rehabilitation treatment strategies, insight oriented psychotherapy and response prevention treatment. In addition, he has been treated with psychotropic medications. Currently he is taking Lithium 900mg per day and Prozac 40 mg per day.

RESPONSE TO TREATMENT:

When Mr. Rice was initially seen he clearly had a chronic, long-standing psychosis as diagnostically demonstrated on the Minnesota Multiphasic Personality Inventory, which is an objective psychiatric diagnostic test that is highly accurate and highly reliable. At that time he was suffering from two psychotic conditions, Bipolar Disorder and Dissociative Disorder. The overall MMPI profile underscores a chronic pattern of psychiatric maladjustment of long-standing duration. Based on history, testing and mental status examination Mr. Rice had the onset of a psychosis in his late teens or early twenties associated with Bipolar Disorder and Dissociative Disorder. This psychosis was chronically present and went untreated until March 1991. The Fifteen Items Test for malingering is negative, which means that Mr. Rice is not malingering any type of mental illness whatsoever. Mr. Rice has undergone extensive psychiatric evaluation and psychiatric treatment to which he has responded quite well. He has been fully compliant with all psychiatric treatment recommendations. He underwent an extensive double crossover treatment protocol on Lithium to ensure that his Bipolar Affective Disorder and Dissociative Disorder are treatable and would respond to the point that they would go into remission (not active disease processes). This was performed in the following manner: Mr. Rice was assessed and his symptoms, thoughts and behaviors in an untreated state were characterized fully. Then treatment with Lithium and Prozac was initiated. Full psychiatric assessment was done on the medications, which revealed the absence of symptoms of Bipolar Disorder and Dissociative Disorder. Once the disorders abated the Lithium and Prozac were withdrawn. Within one week the Bipolar Affective Disorder and Dissociative Disorder returned in full force with the same symptom profile as that prior to treatment. He was then crossed over for a second time (double crossover) back onto the Lithium and Prozac, and his symptoms of

these disorders once again disappeared totally. His Lithium and Prozac levels and compliance in taking the medications can be monitored and will be monitored if appropriate on a regular basis to ensure that Mr. Rice is taking his psychotropic medications, which he has been doing faithfully. The Dysthymia has fully abated as well with psychotherapy and psychotropic medications. Also he has been successfully rehabilitated with respect to the Alcohol Abuse. In addition to individual treatment he has attended AA and has been sober for several years. In summary, all of Mr. Rice's psychiatric disorders have been successfully and completely treated.

MENTAL STATE AT THE TIME OF THE OFFENSE:

During the period of time covered by the allegations, Mr. Rice was in the state of a chronic psychosis and was suffering from the four above-mentioned psychiatric disorders, which rendered him incapable of conforming his conduct and behavior to the requirements of the law. He was unable to distinguish right from wrong and Mens Rea was absent. Simply stated, individuals with Bipolar Disorder frequently engage in inappropriate, impulsive, uncontrollable sexual behavior. The Bipolar Disorder in association with the Dissociative Disorder and their attendant psychoses caused Mr. Rice to dissociate and perceive himself as an adolescent and not as an adult, and also caused him to act in accordance with an adolescent perception of responsibilities and not in the frame work of adult responsibilities. Therefore, Mr. Rice's sexual activities during his adult life in an untreated psychiatric state were perceived by him as normal and as occurring by mutual consent.

CASE ANALYSIS:

1. Mr. Rice does not suffer from pedophilia.

2. He has been successfully treated for:

a. Bipolar Affective Disorder, Mixed

b. Dysthymia

c. Dissociative Disorder NOS

d. Alcohol Abuse

All the above psychiatric disorders are in remission.

3. Mr. Rice's psychiatric disorders are genetic/bio-chemical disorders and therefore are quite amenable to treatment. Certainly these disorders are not a result of his own choice nor actions and are not controllable by Mr. Rice without the assistance of psychiatric treatment.

4. At the time of commission of the alleged offenses Mr. Rice was suffering from the aforementioned mental disorders and as a result he was unable to conform his conduct and behavior to the requirements of the law, was unable to perceive that he was doing wrong nor could he distinguish right from wrong and was incapable of Mens Rea.

5. All disorders have been successfully treated and will remain in remission indefinitely with continued psychiatric treatment.

6. Since Mr. Rice's disorders are in remission and will remain so he will not be a recidivist.

7. Mr. Rice has demonstrated genuine remorse for his actions and their effects on others with respect to the current legal proceedings throughout treatment.

8. Mr. Rice can continue to be a productive citizen in our society.

9. It is my recommendation that Mr. Rice have continued psychiatric treatment on a monthly basis for the rest of his life. If he does so, he will be able to conform his behavior to the requirements of the law. Supervised probation would be the most appropriate psychiatric course of action in conjunction with continued indefinite psychiatric treatment on a regular basis.

Very truly yours,

s/W. Stillings

Wayne A. Stillings, M.D.
Board Certified in Psychiatry by the
American Board of Psychiatry and Neurology
Assistant Professor of Clinical Psychiatry
Washington University School of Medicine

WAS/mf

(2)

Supreme Court, U.S.
FILED
FEB 12 2001
CLERK

No. 00-972

In the Supreme Court of the United States

CONTEMPORARY MEDIA, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether a Federal Communications Commission order revoking petitioners' broadcast licenses and permits and denying an application for a new permit, because the Commission determined that petitioners' continued operations would not further the public interest, is "punishment" subject to the Eighth Amendment's prohibition against excessive fines.

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In the Supreme Court of the United States

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 214 F.3d 187. The order of the Federal Communications Commission (Pet. App. 21a-63a) is reported at 13 F.C.C.R. 14,437 and the order denying the petition for reconsideration (Pet. App. 64a-74a) is reported at 14 F.C.C.R. 8790.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2000. A petition for rehearing was denied on September 14, 2000 (Pet. App. 75a-76a). The petition for a writ of certiorari was filed on December 13, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Communications Act of 1934 requires that the Federal Communications Commission (FCC) determine whether the granting of a license application will further the public interest. 47 U.S.C. 309(a). Even after the FCC awards a license, it is empowered to revoke the license if information comes to the agency's attention which leads to the conclusion that continued operation would not further the public interest. 47 U.S.C. 312(a)(2). In determining whether a license furthers the public interest, the FCC considers, among other things, the character of the license applicant. Pet. App. 28a (citing 47 U.S.C. 308(b), 309(a); *In re Policy Regarding Character Qualifications in Broad. Licensing*, 102 F.C.C. 2d 1179, 1180 (1986)). Thus, the Act requires that all "applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the * * * character * * * of the applicant to operate the station." 47 U.S.C. 308(b). In making these character evaluations, the FCC considers felony convictions not related to FCC conduct because such a conviction may provide "an indication of an applicant's or licensee's propensity to obey the law." *In re Policy Regarding Character Qualifications in Broad. Licensing*, 5 F.C.C.R. 3252, 3252 (1990).

2. Petitioners are corporations that are licensees of five radio stations in Indiana and Missouri, as well as the permittees of two unbuilt radio stations in Missouri, and an applicant for a new radio station in Missouri. Pet. App. 2a. Michael Rice is the sole shareholder of the licensee corporations. *Ibid.* He also is the president

and treasurer of each corporation, and serves on each corporation's board of directors. *Ibid.*

In April 1991, St. Charles County, Missouri prosecutors filed an information charging Rice with three felony counts of sexual assault of an individual between fourteen and sixteen years of age. Pet. App. 2a, 25a. Prosecutors later amended the information and Rice was eventually convicted of four counts of forcible sodomy, six counts of deviate sexual assault in the first degree, and two counts of deviate sexual assault in the second degree. *Id.* at 3a. For these twelve felony convictions, Rice was sentenced to a total of 84 years in prison. *Id.* at 3a-4a. As a result of concurrent sentencing, however, he faced a maximum imprisonment of eight years. *Id.* at 4a.

After prosecutors filed the information against him in April 1991, Rice entered a hospital for psychiatric treatment. Pet. App. 2a. In June 1991, two of the licensees filed reports with the FCC pursuant to 47 C.F.R. 1.65(a), which requires licensees to maintain "the continuing accuracy and completeness of information furnished" to the agency. The filings stated that

> [s]ince Mr. Rice's hospitalization on April 3, 1991, he has had absolutely no managerial, policy, or consultative role in the affairs of the [petitioners]. * * * In other words, pending a resolution of the referenced criminal charges, Mr. Rice is being completely insulated and excluded from any involvement in the managerial, policy, and day-to-day decisions involving any of the * * * stations and * * * construction permits held by the [petitioners].

Id. at 3a.

3. After learning of Rice's conviction and his potential continued involvement in station affairs contrary to petitioners' statements, the Commission issued an order, pursuant to 47 U.S.C. 312(c), directing petitioners to show cause why the licenses and/or construction permits for their existing stations should not be revoked and why the pending application for a new station should not be denied. *In re Contemporary Media, Inc.*, 10 F.C.C.R. 13,685 (1995). The order explained that Rice's convictions and petitioners' potential misrepresentations raised "serious questions as to whether [petitioners] possess the qualifications to be or remain licensees" and thus revocation might be warranted under 47 U.S.C. 312(a)(2), which authorizes revocation when "conditions com[e] to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application."[1] *Id.* at 13,685 & n.5. Following a full evidentiary hearing, the administrative law judge (ALJ) concluded that Rice's felony convictions and petitioners' misrepresentations in their reports to the Commission each constituted a "separate and independent ground" for revocation of the licenses and permits and denial of the pending application. *In re Contemporary Media, Inc.*, 12 F.C.C.R. 14,254, 14,306 (1997).

Petitioners appealed the ALJ's decision, and the Commission affirmed. Pet. App. 21a-63a. The Commission agreed with the ALJ that Rice's felony convictions and petitioners' misrepresentations and lack of

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[1] Section 312(a)(1), which authorizes revocation for "false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title," also provides authority to revoke based on the misrepresentations. 47 U.S.C. 312(a)(1).

candor constituted separate and independent grounds for disqualification of the licenses and permits. *Id.* at 59a. The agency rejected petitioners' argument that the revocations violated the Excessive Fines Clause of the Eighth Amendment, explaining that "the Commission's purpose is not to impose punishment, but it may revoke an authorization where, as here, it finds that the licensee or permittee has not met its statutory obligation to operate its facility in the public interest. *See* 47 U.S.C. §§ 307(a), 309(a)." *Id.* at 61a. Petitioners sought reconsideration, which the Commission denied. *Id.* at 64a-74a.

4. The court of appeals "affirm[ed] the FCC in all respects." Pet. App. 2a. The court first rejected petitioners' argument that the FCC's policy of considering non-FCC-related misconduct in evaluating character is arbitrary and capricious, explaining that there is "nothing irrational in the conclusion that the violation of the criminal laws is relevant to [evaluating propensity to obey the law] and to the issue of character in general." *Id.* at 7a. The court of appeals also rejected petitioners' challenge to the application of the FCC character policy to the facts of this case. *Id.* at 10a-14a. And the court specifically found that substantial evidence supports the FCC's determination that petitioners "misrepresented and lacked candor in reporting to the Commission that, subsequent to his arrest, Rice was completely excluded from any further involvement in the management and operation of [petitioners'] radio stations." *Id.* at 14a-18a.

With respect to the Excessive Fines Clause argument that petitioners ask this Court to review, the court of appeals explained that "[t]he FCC revokes a license not to punish a licensee for its conduct, but because that conduct indicates to the Commission that

the licensee is no longer qualified to hold it." Pet. App. 20a. A licensee is no longer qualified to hold a license "when the Commission concludes that the licensee can no longer be trusted to deal with it honestly, to follow its regulations, and to operate in the public interest." *Ibid.* The court of appeals also noted this Court's ruling that denial of FCC licenses "is not a penal measure." *Id.* at 19a (quoting *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 228 (1946)).

ARGUMENT

The decision of the courts of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the petition challenges only one of the two "separate and independent grounds" (Pet. App. 59a) upon which the FCC disqualified petitioners from holding broadcast licenses. Thus, even if petitioners could show that the FCC's decision to disqualify based on Rice's felony convictions was unlawful, the agency's decision to revoke would stand on an independent ground that is unchallenged in the petition. Further review is not warranted.

1. The FCC decision expressly states that "Rice's felony convictions and the Licensees' misrepresentation and lack of candor with respect to Rice's role at the radio stations subsequent to his arrest *constitute separate and independent grounds* for disqualification of the Licensees." Pet. App. 59a (emphasis added); see also *Contemporary Media*, 12 F.C.C.R. at 14,306 (ALJ reaching same conclusion). In the court of appeals, "the licensees conceded that if [the court] were to sustain the FCC's finding of intentional misrepresentation[,] that alone would be sufficient ground for the revocation of their licenses." Pet. App. 14a. And the court of appeals did sustain the FCC's "separate and inde-

pendent" determination, upholding the agency's finding of misrepresentations, *id.* at 14a-18a, and noting that revocation is an appropriate remedy for this conduct, *id.* at 14a ("[I]t is well recognized that the Commission may disqualify an applicant who deliberately makes misrepresentations or lacks candor in dealing with the agency." (quoting *Schoenbohm* v. *FCC*, 204 F.3d 243, 247 (D.C. Cir.), cert. denied, 121 S. Ct. 405 (2000)). Petitioners point to one word in the FCC decision—"[c]umulatively," *id.* at 61a—to argue that the FCC did not actually mean what it said when it unequivocally stated that Rice's felony convictions and petitioners' misrepresentations constituted "separate and independent grounds for disqualification." *Id.* at 59a; see Pet. 2 n.1. This is too little and too late. As discussed above, the court of appeals correctly concluded that the FCC decision rested on separate and independent grounds and petitioners conceded this point in the court of appeals. Because petitioners do not challenge the "separate and independent" ground that their misrepresentations warranted revocation, any review of the other ground for revocation would not affect the remedy in this case.

2. In any event, the revocation based on Rice's felony convictions does not implicate the Excessive Fines Clause of the Eighth Amendment.[2] "The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense.'" *Austin* v. *United States*, 509 U.S. 602, 609-610 (1993) (quoting *Browning-*

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[2] It is unclear whether the Eighth Amendment's prohibition on excessive fines protects corporations, such as petitioners, as well as individuals. See *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989).

Ferris Indus. of Vt., Inc. v. *Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)) (emphasis by the Court). An action that serves solely a remedial purpose does not implicate the Excessive Fines Clause. 509 U.S. at 610. Thus, even if we assume that forfeiture of an FCC license is a "payment,"[3] the court of appeals correctly held that the FCC's revocation did not implicate the Excessive Fines Clause because it served only remedial purposes.

The court of appeals found reasonable the FCC's conclusion that Rice's felony convictions indicated that petitioners did not possess the character necessary to ensure that the licenses and permits would serve the public interest. Pet. App. 4a-14a. Petitioners do not challenge that conclusion before this Court.[4] The obvious remedy for a finding that a licensee does not possess the qualifications necessary to hold a license is to revoke the license. Congress provided that remedy

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[3] Given this Court's holdings that the granting of an FCC license does not confer a property interest, see *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 394 (1969) ("Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them."); *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) ("The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license."), it is difficult to see how revocation of a license could be considered a "payment" to the government.

[4] Some of the language in the petition continues to criticize the FCC policy of considering non-FCC-related misconduct to determine character. The petitioners do not, however, ask this Court to review the court of appeals' rejection of petitioners' challenge to the agency's character policy as arbitrary and capricious. Thus, as this case comes to the Court, it must be assumed that the FCC properly determined that petitioners do not possess the character required of licensees.

in 47 U.S.C. 312(a)(2) and the FCC exercised it in this case. As the FCC explained, revocation is an appropriate remedy when a "licensee or permittee has not met its statutory obligation to operate its facility in the public interest." Pet. App. 61a.

Contrary to petitioners' assertion (Pet. 3), this Court's Excessive Fines Clause decisions support the view that the FCC action in this case is not punitive. In *Austin* v. *United States*, *supra*, this Court considered its previous decisions in determining whether a historical "understanding of forfeiture as punishment" existed. *Id.* at 615. As a prior decision of this Court makes clear, the historical understanding is that FCC disqualification determinations are not punitive. In *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946), a radio station argued that the FCC's decision not to renew its license, because of misrepresentations the station made in its FCC filings, "inflict[ed] a penalty." *Id.* at 228. This Court disagreed, holding that a "denial of an application for a license because of the insufficiency or deliberate falsity of the information lawfully required to be furnished is not a penal measure."[5] *Ibid.* While an

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[5] Petitioners attempt to distinguish *WOKO* because it involved a misrepresentation to the agency, as opposed to a conclusion based on non-FCC-related misconduct that a licensee or permittee did not have the requisite character. As discussed in footnote 4, *supra*, however, petitioners do not challenge the reasonableness of the FCC's conclusion that petitioners no longer satisfied the statutory requirement of furthering the public interest. Given this finding, which the court of appeals affirmed, there is no pertinent distinction between a revocation based on misrepresentation and one based on a finding that a licensee or permittee is not furthering the public interest. Pet. App. 61a. In either case, the FCC is remedying the fact that a licensee or permitee no longer meets the statutory requirements for holding a license or permit.

adverse licensing decision "may hurt and it may cause loss," that alone does not make an action punitive. *Ibid.*; see also *United States* v. *Halper*, 490 U.S. 435, 447 n.7 (1989) (explaining that courts should not determine whether a sanction is punishment from the perspective of the affected party because from that perspective "even remedial sanctions carry the sting of punishment"). In this case, petitioners base their contention that the FCC order is a "penalty" on nothing more than an assertion that the disqualification will "hurt" and will "cause loss" to Mr. Rice. That was not sufficient to make the FCC action in *WOKO* a penalty, and it is not sufficient to make the FCC action in this case a penalty.[6]

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[6] Petitioners contend that the court of appeals' decision in this case conflicts with its earlier decision in *Wilkett* v. *ICC*, 710 F.2d 861 (D.C. Cir. 1983). Pet. 17-18. But *Wilkett* did not involve an Excessive Fines Clause issue; the court of appeals vacated the ICC decision because it was arbitrary and capricious. The court of appeals in this case adequately distinguished *Wilkett* with respect to petitioners' arbitrary and capricious challenge (Pet. App. 9a), a challenge that is not renewed in the petition for certiorari. In any event, any inconsistency in intracircuit decisions would be a matter for the court of appeals, rather than this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CONCLUSION

The petition for writ of certiorari should be denied.
Respectfully submitted.

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No. 00-972

IN THE

Supreme Court of the United States

CONTEMPORARY MEDIA, INC, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Petitioners respectfully submit their reply to the Brief in Opposition of the Federal Communications Commission ("FCC") and the Department of Justice (collectively "the Government").

I. The Excessive Fines Issue Is Not Insulated from Review by any "Separate and Independent Ground" for the FCC's Action

The Government argues that Supreme Court review of the excessive fines issue is "not warranted" because the FCC allegedly based its revocation sanction on two "separate and independent grounds": 1) Mr. Rice's state criminal conviction and 2) false statements made to the FCC regarding Mr. Rice's role at his radio stations subsequent to the filing of the state charges. Op. Brief at 6-7. The plain language of the FCC's decision does not support the Government's claim.

In its decision, the FCC did state that "we find that Rice's felony convictions and the Licensees' misrepresentation and lack of candor with respect to Rice's role at the radio stations subsequent to his arrest constitute separate and independent grounds for disqualification of the Licensees."[1] The FCC immediately went on to state, however: "Moreover, *the totality of the evidence in this proceeding* of Rice's criminal acts and the Licensees' deceit *convinces us that the Licensees lack the requisite character qualifications* to deal truthfully with the Commission and to comply with our rules and polices."[2] The FCC thus stated that its ultimate

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[1] *Contemporary Media, Inc.*, 13 F.C.C. Rcd. 14437, 14459 (1998) (¶41) (Pet. App. B at 59a) ("*FCC Decision*"), *recon. denied*, 14 F.C.C. Rcd. 8790 (1999), *aff'd Contemporary Media, Inc. v. FCC*, 214 F.3d 187 (D.C. Cir. 2000).

[2] *FCC Decision*, 13 F.C.C. Rcd. at 14459 (¶41) (Pet. App. B at 60a) (emphasis supplied).

conclusion regarding the licensees' "character qualifications" was a "gestalt" judgment based on the "totality of the evidence" in the case.

Were there any remaining doubt on this point, the FCC dispelled it two paragraphs later. After rejecting in summary fashion Petitioners' Eighth Amendment excessive fines argument, the FCC returned to the subject of the proper penalty to impose. The FCC stated:

> As previously explained, we believe the misconduct in this case was extremely serious, involving egregious criminal acts by the Licensees' sole owner and repeated misrepresentations by the Licensees designed to minimize the effect of Rice's criminal record on their qualifications. *Cumulatively, the evidence of misconduct warrants a conclusion that the Licensees lack the requisite character traits of truthfulness and reliability to retain their authorizations. . . . We conclude that revocation is appropriate in the circumstances of this case.*[3]

The FCC thus based its ultimate decision to revoke all of Mr. Rice's radio licenses and permits not on two "separate and independent grounds," but rather on "the totality of the evidence" and the "cumulative" weight of the evidence on *both* the criminal misconduct and the false statement issues. This is proved not by "one word" in the decision, as the government

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[3] *Id.* at 14460 (¶ 43) (Pet. App. B at 61a-62a) (emphasis supplied).

would have it (Op. Brief at 7), but by *the entirety of what the FCC said about the matter.*[4]

It is well settled that federal administrative actions are reviewed on appeal based on the reasons given by the agency itself in explaining the decision it reached. *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943). The *post hoc* rationalizations and improvisations of appellate counsel cannot supply a missing basis, or modify a stated basis, for agency action. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Where an agency relies on multiple grounds, one of which is infirm, its decision cannot be upheld unless it is *clear* from the agency's decision that the agency would have reached the same result in the absence of any consideration of the invalid ground. *E.g., Syracuse Peace Council v. FCC,* 867 F.2d 654, 657 (D.C. Cir. 1989), *cert.*

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[4] The Government also claims that a former counsel for Petitioners "conceded" during oral argument before the Court of Appeals that "the FCC decision rested on separate and independent grounds." Op. Brief at 6-7. The statement in the D.C. Circuit's opinion on which the Government relies (Pet. App. A at 14a) does not support the Government's claim. While former counsel may have "conceded" that intentional misrepresentation can constitute, in an appropriate case, an adequate legal basis for license revocation (which it can), nothing in the D.C. Circuit's opinion indicates that any "concession" was made regarding whether the *FCC's decision* "rested on separate and independent grounds." Petitioners note that a transcript of the oral argument before the Court of Appeals: 1) is not in their possession; 2) is not in the record; 3) has not been supplied by the Government; and 4) has not been quoted by the Government. Moreover, even assuming that former counsel did "concede" something about the basis of the FCC's decision which the decision itself shows is not true, such a "concession" would scarcely require the Supreme Court to ignore what the FCC itself said in its decision. Adjudication is not a game; it is a solemn search for justice. The Government forgets this. The Court must not do so.

denied, 493 U.S. 1019 (1990). No such conclusion is possible in this case.

If the FCC's decision makes anything plain, it is that the agency was powerfully – indeed, decisively – influenced by what the FCC termed Mr. Rice's "egregious" sexual misconduct. It is by no means "clear" from the FCC's decision that the agency would have revoked all of Mr. Rice's radio licenses and permits in the absence of that so-called "egregious" misconduct. The strong likelihood, in fact, is that it would not have done so.[5]

As the Government appears to concede (Op. Brief at 8), the FCC's revocation sanction cannot be sustained if it constitutes, in whole or in part, a punitive sanction, for in that event it would be subject to Eighth Amendment scrutiny, and a hearing would thus be required to determine whether the FCC's massive, multi-million dollar revocation penalty is grossly disproportionate to the misconduct of Michael Rice. Supreme Court consideration of whether the Eighth

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[5] The "misrepresentation/lack of candor" evidence before the agency was far from compelling. The alleged false statements 1) were not authored, approved or submitted by Mr. Rice himself; 2) were drafted, signed and submitted by Washington legal counsel for the licensees; and 3) were couched in what proved to be, in hindsight, unfortunately vague and ambiguous language. Under such circumstances, any inference of the required intent on the part of Mr. Rice to deceive the FCC is, at best, difficult to draw. Other mitigating circumstances, too numerous to detail here, make the case for total revocation based on the misrepresentation issue alone extremely weak. That is doubtless one reason why the FCC expressly relied in its decision on "the totality" of the evidence on both issues in reaching its ultimate revocation decision. All of these matters properly will be subject to FCC evaluation in the context of an appropriate Eighth Amendment hearing to determine whether the FCC's ultimate revocation penalty was grossly disproportionate to the misconduct of Michael Rice.

Amendment applies to the FCC's revocation sanction is therefore warranted, because the FCC's draconian revocation penalty could well be altered and reduced as a result of proper Eighth Amendment scrutiny.

II. The FCC's Revocation Sanction Was Not "Solely Remedial"

The Government admits that government sanctions which are punitive, even in part, are fully subject to the Eighth Amendment's prohibition of excessive fines. Op. Brief at 8, citing *Austin v. United States,* 509 U.S. 602, 610 (1993) ("*Austin*"); *accord United States v. Bajakajian*, 524 U.S. 321, 329 n.4 (1998) ("*Bajakajian*"). The Government claims, however, that the FCC's decision to revoke all of Michael Rice's radio licenses and permits based on his unrelated state conviction for sexual offenses was not in any respect punitive, but rather "served only remedial purposes." Op. Brief at 8. How revoking seven federal radio station licenses and permits based on state law sex offenses that had nothing to do with the radio stations could be thought a "remedial" action is at best obscure, and the Government's effort to explain its position is neither clear nor convincing.

According to the Government, Mr. Rice's conviction for unrelated sex offenses demonstrated that his "character" was not that of one "qualified" to own and operate a radio station "in the public interest." The problem to be "remedied," according to the Government, was that someone not "qualified" to own a radio station nevertheless owned one. In such a case, the Government "reasons," the "obvious remedy" is "to revoke the license." Op. Brief at 8. The Government claims, in other words, that the FCC did not "punish" Michael Rice for his unrelated sex crimes; it merely subjected him to a "remedy" because he had the "bad character" to commit them.

This "reasoning" produces interesting results when applied in other contexts: A felon, for example, is not incarcerated as "punishment" for his crime, but rather "solely as a remedy" because his crime proves his "character" to be that of one "unqualified" to remain unconfined. Similarly, a drug offender is not deprived of federal benefits under 21 U.S.C. §862 as a "punishment," but rather "solely as a remedy" because his offense proves him "unqualified" to receive such benefits. And in a case lately heard by the Supreme Court, Mr. Hosep Bajakajian was not ordered to forfeit $357,144 in cash as a "penalty" for not declaring the cash to Customs, but rather "solely as a remedy," because 18 U.S.C. §982(a)(1) provides that those who fail to report their cash to Customs lack the "qualifications" that would entitle them to keep it. Since Mr. Bajakajian was not "qualified" to retain his money, the "obvious remedy" – by the Government's "reasoning" – was to take it away from him.[6]

The Government's conception of the "remedial" departs from common understanding and the decisions of the Supreme Court. A "remedial" action is one designed "'to obtain compensation or indemnity;'"[7] one which seeks to "compensate the Government for the expense of law enforcement activity and . . . societal problems;" one which

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[6] To escape these and similar absurd consequences, the Government's argument would have to posit that radio station licenses and permits are distinct from other types of property. Such a theory might hold, for example, that a radio station owner is a sort of secular, FCC-anointed "priest" who must remain worthy of his sanctified status or suffer the loss of his broadcast "parish." Since the Government espouses no such theory in its opposition brief, there is no need to debate its dubious validity here.

[7] *Bajakajian,* 524 U.S. at 329, quoting BLACK'S LAW DICTIONARY 1293 (6th ed. 1990); *see also* BLACK'S LAW DICTIONARY 1279 & 1293 (6th ed. 1990) ("remedial" means "giving means of obtaining redress"; "redress" means "[s]atisfaction for an injury or damages sustained").

imposes "liquidated damages;" or one which "removes dangerous or illegal items from society."[8] The FCC's revocation penalty in this case does not further, and was not designed to further, any of these remedial ends. It is entirely punitive in nature.

The Supreme Court has made plain that actions designed to exact retribution or to deter misconduct are punitive, not remedial. "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand that term." *Austin,* 509 U.S. at 610, *quoting United States v. Halper,* 490 U.S. 435, 448 (1989); *see also id.* at 620-21; *accord Bajakajian,* 524 U.S. at 329 ("[d]eterrence, however, has traditionally been viewed as a goal of punishment"). While one might reasonably debate whether the FCC acted in part for retributive reasons in imposing its massive license revocation sanction on Michael Rice, one cannot reasonably deny that it acted to deter misconduct. This is so because the FCC itself has repeatedly said that this is so. In its *Character Policy Statement,* for example, the FCC said:

> [D]eterrence is an important element of the character qualifications process, as it helps to ensure future reliability and truthfulness. The role of deterrence in the licensing process has long been recognized. . . . Sanctions imposed

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[8] *Austin,* 509 U.S. at 620-21, *citing, inter alia, United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 364 (1984), *and One Lot Emerald Cut Stones v. United States,* 409 U.S. 232, 237 (1972); *see also Bajakajian,* 524 U.S. at 329 (remedial action "compensates the government for lost revenues").

> may deter future misconduct of the applicant in question and of others observing our actions.[9]

The Supreme Court has held that sanctions intended to deter misconduct are punitive. The FCC has held that license revocation is intended to deter misconduct. License revocation is therefore a punitive sanction. The Government's contrary claim is without merit.

The Government also claims that the "historical understanding" is that license revocation is "not punitive." Op. Brief at 9, citing *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946) ("*WOKO*"). Not so. The FCC has "historically" – and repeatedly – said that the central purpose of license revocation is deterrence, a goal the Supreme Court has found to be punitive. Indeed, the FCC has also "historically" – and repeatedly – referred to license revocation not as a "remedy," but as a *penalty* for misconduct.[10] The Supreme Court also

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[9] *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1228, *on recon.*, 1 F.C.C. Rcd. 421 (1986); *see, e.g., Broadcast Hoaxes*, 7 F.C.C. Rcd. 4106, 4107 (1992) (discussing the "deterrence value" of fines, license revocation and other sanctions for licensee misconduct); *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 F.C.C. Rcd. 3252, 3254 n. 4 (1990) (discussing the "deterrent impact" of loss of license); *United Broadcasting Co.*, 100 F.C.C.2d 1574, 1585 (1985) (¶24) (discussing the deterrent effect of loss of license); *Faulkner Radio, Inc.*, 88 F.C.C.2d 612, 615-16 (1981) (same); *see also Richard Richards*, 10 F.C.C. Rcd. 3950, 3955 (Rev. Bd. 1995) (collecting cases).

[10] *E.g., Broadcast Hoaxes*, 7 F.C.C. Rcd. at 4107 (admonitions, fines, non-renewal of license and license revocation are available "penalties" for broadcast hoaxes); *Overall Renewal/Revocation Approach to Implementation of 47 U.S.C. §312(a)(7)*, 93 F.C.C.2d 423, 432 (1983) (license revocation is a "sanction" and a "penalty" under Section 312(a) of the Communications Act); *Theodore E. Sousa*, 92 F.C.C.2d 173, 179 (1982) (Section 312(a)(2) provides for "revocation penalty").

has referred to license revocation as a "penalty." *CBS, Inc. v. FCC*, 453 U.S. 367, 378 (1981).[11]

The Government's claim that the FCC's revocation sanction was "solely remedial" is thus factually and legally false.

III. The Government's Subsidiary Claim that License Revocation May Not Be a "Payment" Lacks Merit

The Government claims in a footnote that it is "difficult" to see how license revocation could be considered a "payment" to the government, because past decisions of the Supreme Court have noted that, under Section 301 of the

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[11] The Government claims the Supreme Court's *WOKO* decision is to the contrary, but it is not. As Petitioners have already pointed out (Pet. at 16), the *WOKO* decision said that denial of a license renewal application due to "the insufficiency or deliberate falsity of the information lawfully required to be furnished" is not a "penal measure." 329 U.S. at 228. This case involves, by contrast, the revocation of existing licenses and permits due to sexual misconduct that had *no relationship whatsoever to the radio stations*. The Government professes to see "no pertinent distinction" (Op. Brief at 9 n.5), but its reason why is as cloudy as its eye for spotting "pertinent distinctions" appears to be. The Government seems to claim that Petitioners must allege the *statutory* invalidity of the FCC's action in order to challenge the action's constitutionality. That is not so. Although Petitioners have not made the "reasonableness" of the FCC's action the centerpiece of a separate legal challenge; they *have* challenged the action's constitutionality under the Eighth Amendment. An action that is unconstitutional would seem to encompass, as a "lesser included offense," the flaw of "unreasonableness." And to the extent the Government argues that an FCC action which violates the Constitution may still serve "the public interest," the argument self-evidently lacks merit. This would be so even if FCC Chairman Powell had not recently displayed the great candor and good sense to state that the "public interest" standard suffers from a severe case of vagueness. E.g., The Washington Post, Feb. 7, 2001, §E at 1; N.Y. Times, Feb. 7, 2001, §C at 1, col. 2.

Communications Act, licensees do not "own" their radio frequencies or hold any "right beyond the terms . . . of the license." 47 U.S.C. §301; see Op. Brief at 8 n.3, citing *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 394 (1969), and *FCC v. Sanders Bros. Radio Station,* 309 U.S. 470, 475 (1940). The fact that no vested right of ownership of the radio spectrum is permitted under the Communications Act scarcely means that an authorization to use that spectrum for a term of years is not a valuable property interest the revocation of which can constitute a "payment in kind" under the Eighth Amendment. As Petitioners pointed out in their petition (at 14-15 n.29), radio licenses and permits are routinely sold by their holders *and also by the government* for tens and even hundreds of millions of dollars. Given this, it is understandable that the Government has restricted its argument on this point to a claim of puzzlement and relegated it to a footnote.

IV. Conclusion

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

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